92-362

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

HISPANIC CHAMBER OF COMMERCE, et al.,

Appellants,

v.

ARIZONANS FOR FAIR REPRESENTATION, et al.,

Appellees.

Appeal From The United States District Court For The District Of Arizona

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the District Court, with no legislated plan before it, erred in finding no violation of Section 2 of the Voting Rights Act and therefore no requirement for remedial action in redistricting, in elevating nonconstitutional good government factors to primary considerations over minority voting rights and in failing to conduct a review of its own plan under Section 5 of the Voting Rights Act.

Whether the District Court erred in the use of incorrect causation standards to determine racially polarized voting does not exist in Arizona and in its rejection of uncontroverted evidence of racially polarized voting without explanation.

Whether the District Court erred by ordering into effect its own permanent plan for elections without exigent circumstances, allowing the state to circumvent Section 5 preclearance requirements for its congressional plan for an entire decade.

LISTING OF ADDITIONAL PARTIES

APPELLANTS

Hispanic Chamber of Commerce, Inc.
Arizona Hispanic Community Forum
Edward Valenzuela
Richard Zazueta
Valerie Ann Vidal

APPELLEES

The **San Carlos Apache Tribe,** a Federally Recognized Indian Tribe, and **Raleigh Thompson,** Chairman, and **Burnette Rope,** Vice Chairman, and as Individual Tribal Members, **Vernon Masayesva,** Chairman, **Loris Minkler** and **Wayne Taylor, Jr.,** Individual Tribal Members of the **Hopi Indian Tribe,** a Federally Recognized Indian Tribe **The Tonto Apache Tribe,** a Federally Recognized Indian Tribe, **Louise C. Lopez,** Chairman, **Jeri Johnson,** Vice Chairman, and as Individual Tribal Members, **Yavapai-Apache Indian Community, Camp Verde Reservation, David Kwail,** Chairman, **Stanley Jackson,** Vice Chairman, and as Individual Tribal Members, **The Havasupai Tribe,** a Federally Recognized Indian Tribe, **Don Watahomigie,** Chairman, **Thomas Siyuja, Sr.,** Vice Chairman, and as Individual Tribal Members, **The Cocopah Indian Tribe,** a Federally Recognized Indian Tribe, **Pete Sotos, Individual Tribal Members**

J. Fife Symington, Governor of the State of Arizona

Richard D. Mahoney, Secretary of State of the State of Arizona

Arizona State House of Representatives

Arizona State Senate

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LISTING OF ADDITIONAL PARTIES iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF THE CASE 1
THE QUESTIONS PRESENTED ARE SUBSTANTIAL .. 4
I. INTRODUCTION 4
II. WITH NO LEGISLATED PLAN BEFORE IT, THE DISTRICT COURT ERRONEOUSLY FOUND NO VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT REQUIRING REMEDIAL ACTION IN REDISTRICTING, ELEVATED NON-CONSTITUTIONAL GOOD GOVERNMENT FACTORS TO PRIMARY CONSIDERATION OVER MINORITY VOTING RIGHTS, AND FAILED TO CONDUCT A REVIEW OF ITS OWN PLAN UNDER SECTION 5 OF THE VOTING RIGHTS ACT 6
III. THE DISTRICT COURT'S ERRONEOUS SECTION 2 DETERMINATION RESTED ON A BLANKET DISAVOWAL OF RACIALLY POLARIZED VOTING WHICH WAS BASED ON INCORRECT STANDARDS AND ITS REJECTION OF UNCONTROVERTED EVIDENCE WITHOUT EXPLANATION 10
IV. THE DISTRICT COURT ERRED BY ORDERING INTO EFFECT ITS OWN PERMANENT PLAN FOR ELECTIONS WITHOUT EXIGENT CIRCUMSTANCES AND THEREBY COMPLETELY CIRCUMVENTING SECTION 5 PRECLEARANCE REQUIREMENTS FOR AN ENTIRE DECADE 14
CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Beer v. United States, 425 U.S. 130 (1976) 9

Connor v. Finch, 431 U.S. 407 (1977) 8, 15

McDaniel v. Sanchez, 452 U.S. 130 (1981) 8, 14, 18

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Roman v. Sincock, 377 U.S. 695 (1964) 8

Terrazas v. Clements, 537 F.Supp. 514 (N.D. Tex. 1982) 15

Thornburg v. Gingles, 478 U.S. 30 (1986) 11, 12, 13

United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) 9

Westwego Citizens for Better Government v. Westwego, 872 F.2d 120 (5th Cir. 1989) 12

Wise v. Lipscomb, 437 U.S. 535 (1978) 8, 17

UNITED STATES CONSTITUTION

Fourteenth Amendment 4

Fifteenth Amendment 4

STATUTES

28 U.S.C. § 1253 1

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c ..... *passim*

OPINIONS BELOW

The April 30, 1992 Memorandum Decision and Order of the three judge court has not yet been officially reported. It was filed in the United States District Court for the District of Arizona in case number 92-256-PHX-SMM, and is set out in the accompanying Appendix at App. 1a.

JURISDICTION

The Order appealed from was filed May 5, 1992. An extension of time to August 27, 1992, to file Appellants' Jurisdictional Statement was granted on July 21, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

The State of Arizona experienced a population growth over the decade of the 1980's that entitled the State to a new, sixth congressional district following the 1990 Census and the apportionment of congressional representation to the states. App. 1a.[1] Apportionment Population and State Representation: Communication from the President of the United States, H.D. 102-18, p. 3 (January 7, 1991). The combined minority population of Arizona grew from 25.4% of the total population in 1980 to 28.9% in 1990. All minority populations grew at rates faster than

[1] References to the Appendix shall be noted as App. ___ a.

the non-minority population. The Hispanic population alone experienced a 52% increase. Prior to the 1990 census, the state congressional delegation was limited to five members. Of the five districts electing congressmen, one (district 2) had a majority combined minority population of 58% that had elected the first minority (Hispanic) congressman for the State in a special election in 1991.

The Arizona State legislature undertook the process of redistricting during the first 1992 regular session. App. 2a. This litigation was commenced by a non-profit organization, Arizonans for Fair Redistricting, and three voters of Arizona, all non-minority, on February 7, 1992, during the course of that legislative session and prior to adoption of any legislative or congressional redistricting plan by the legislature. App. 1a. The Arizonans' complaint asked the district court to accomplish Arizona's congressional redistricting due to an asserted deadlock between the two houses of the bicameral legislature over the issue of redistricting during the session. *Id.* The deadlock, asserted in early February, fixed in late February with regard to congressional redistricting once the district court demonstrated its interest in a quick disposition of the case. The legislative session did not end until late June, 1992.

On March 3, 1992, the district court issued a pre-trial order setting the schedule and regulating activity in the litigation on the congressional case only. The hearing on plans presented by parties was scheduled for April 13, 1992. The court realigned two State defendants, the governor and the State House, as plaintiffs with the Arizonans for Fair Representation. App. 2a. The court allowed the intervention as plaintiffs of several minority parties,

including (1) the Hispanic Chamber of Commerce and the Arizona Hispanic Forum, (2) several Native American Tribes and (3) Ed Pastor, congressman for existing district 2. *Id.*

Two original and all intervening parties presented plans to the court. *Id.* Plans presented by the Hispanic appellants, Plaintiff Intervenor Pastor, and the Arizona Senate created two districts that contained a majority of combined minority populations. The plan presented by the Arizona House of Representatives, supported by the Arizonans for Fair Representation, created one very high majority minority population. The plan presented by the Indian Intervenors created only one majority minority district, at a lower level than the House plan's minority district.

During the course of the five day hearing on the attributes of the parties' plans, limited evidence showing the malapportionment of the existing five congressional districts as compared to the ideal district in a six district plan was presented to the court. App. 3a. Following the parties' presentation of evidence in support of their plans to the court, the court appointed as its advisors the technical staff for the Senate and the House. App. 20-1a. The attorney representing the Attorney General's office for the State of Arizona in the proceedings before the court was designated special counsel to the court. App. 21a.

The district court issued an order April 30, 1992, filed with the Clerk May 5, 1992. The court ordered its own plan into effect for congressional districts. App. 9a. The court also authorized the use of all precinct and polling place changes on an interim basis, due to the proximity of

the candidate filing period, scheduled to begin in three weeks, on May 26, 1992, and end on June 25, 1992. App. 19-20a. Finally, the court ordered its plan into effect through the year 2000, until and unless the Arizona legislature enacts and receives preclearance of a different redistricting plan. App. 20a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

This case involves substantial questions concerning the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution as those provisions are applied when a court undertakes a legislative redistricting task. Additionally, this case involves substantial questions as to the authority accorded a district court to undertake a legislative redistricting task. Specifically, this case involves the standards to be applied by a court in analyzing a proffered redistricting plan or developing its own for a jurisdiction covered by Section 5 of the Voting Rights Act and the criteria that must be met before a court seeks to impose its own plan for redistricting, circumventing the legislative process and Section 5 preclearance requirements.

The district court below adopted a permanent court-drawn plan for congressional elections in Arizona as the State legislature, it determined, was at an impasse even though still in session. Although recognizing that all plans before it met one-person, one-vote constitutional standards, the court determined to impose its own plan because it found that plan superior to all proposed plans

in meeting "good government" criteria. The court erroneously found no violation of Section 2 of the Voting Rights Act, despite having no issue of liability before it. Therefore, the court did not analyze any proposed plan or its own plan for impact on minority voters under Section 5 standards. Further, because the Court had erroneously found no violation of Section 2 of the Voting Rights Act, it undertook no use of racial criteria in fashioning its plan. Finally, the court found no evidence of racially polarized voting in the State despite the unanimous presentation of evidence by parties demonstrating the existence of racially polarized voting.

In implementing the modified litigant's plan as a court drawn plan, rather than choosing a litigant's plan or deferring to the legislature, the court made no findings of exigent circumstances. With the adoption of a court-drawn plan, the court ordered into effect a permanent plan that circumvented Section 5 preclearance requirements, again avoiding review of the impact of the State's congressional plan on minority voters. With adoption of the plan for use until the year 2000, Arizona's avoidance of review of the impact of its congressional plan on minorities will last the entire decade.

The effect of the district court's erroneous order has been to completely avoid consideration of minority voters in the congressional redistricting process for the State of Arizona.

II. WITH NO LEGISLATED PLAN BEFORE IT, THE DISTRICT COURT ERRONEOUSLY FOUND NO VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT REQUIRING REMEDIAL ACTION IN REDISTRICTING, ELEVATED NONCONSTITUTIONAL GOOD GOVERNMENT FACTORS TO PRIMARY CONSIDERATION OVER MINORITY VOTING RIGHTS, AND FAILED TO CONDUCT A REVIEW OF ITS OWN PLAN UNDER SECTION 5 OF THE VOTING RIGHTS ACT

In its Memorandum of Decision and Order, issued April 30, 1992, the district court ordered into effect its own plan for election of congressional representatives from Arizona. App. 9a. The court's plan created one majority combined minority district, district 2, at 61% minority population, out of the six districts. App. 9-10a. The Court determined that its own plan best addressed good government concerns. App. 17a.

The district court's fashioning of an appropriate good government plan for implementation for Arizona congressional districts was predicated on its conclusion that no violation of Section 2 of the Voting Rights Act existed. App. 8-9a. Because no Section 2 violation existed, the court determined it was not required to take remedial action under the Voting Rights Act in fashioning the redistricting plan. App. 8a. As no remedial action was required under Section 2, the court determined redistricting plans were only required to meet the constitutional standard of one-person, one-vote and non-constitutional "good government" considerations. App. 9a. The good government criteria used by the court included geographical compactness and contiguity, preservation of

communities of interests and existing districts, and the unnecessary and invidious outdistricting of incumbents. App. 5-7a. Once the court found that no violation of the Voting Rights Act existed, the court then evaluated all other plans for levels of deviation and conformance with "good government" standards. App. 4a and 15-22a. The Court applied the criteria without regard to impact on minority voters of the state. *Id.* The Court rejected all other plans as failing to adequately comply with good government standards. App. 9a.

The district court reached its determination that there was no violation of Section 2 of the Voting Rights Act without having a question or controversy before it or presentation of evidence on the issue. There was in fact no redistricting "plan" as such, adopted by the legislature. All parties recognized that the previous five district plan could not be used because of the addition of a new district for congressional elections. The court had simply been asked to review proposals and to select or create a new plan because the legislature could not. There were no issues of liability before the court.

The only conceivable purpose of the court's finding with regard to Section 2, therefore, was to allow the elevation of secondary neutral factors, or "good government" factors, to a primary level of consideration over minority voting rights. By doing so, the court was able to justify its resulting congressional redistricting plan. The court's actions wrongly presumed that consideration of race or ethnicity of voters in redistricting, or race conscious redistricting, was only required accomplished where a violation of a constitutionally or statutorily protected right was demonstrated to have occurred.

The responsibility for state wide redistricting is first and foremost that of the state legislature. *Wise v. Lipscomb*, 437, 539 (1978). When it becomes necessary for a district court to assume the "unwelcome obligation" of devising and/or approving redistricting plans, however, courts must adopt plans that will not be potentially subject to future challenges. *Connor v. Finch*, 431 U.S. 407, 425 (1977) (*Connor*). Discharge of the obligation requires a court to adhere more strictly to the constitutional and federal statutory standards governing redistricting than a state legislature in the process. *Wise v. Lipscomb*, 437 U. S. 535, 540 (1978) (*Wise*). Further, a federal court must act "circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.' " *Connor*, 431 U.S. at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)).

Where a court in a Section 5 covered jurisdiction is faced with the task of choosing among plans or fashioning its own plans because of inaction by a legislature, there is no plan before the court for analysis under Section 2 of the Act. Therefore, there can be no determination with regard to the "results" of a plan, as the court made here. Rather, the concern of the court is the evaluation of plans under the primary criteria of 1) one-person, one-vote and 2) potential impact on minority voters with regard to Section 5. *McDaniel v. Sanchez*, 452 U.S. 128 (1981) (*McDaniel*). When a court orders its own plan into effect it is required to examine the compliance of that plan with Section 5 requirements. *McDaniel*, 452 U.S. at 149.

This Court has specifically rejected the limitation of race conscious redistricting to only circumstances where

effects of past discriminatory districting or apportionment are demonstrated. *United Jewish Organizations, Inc. v. Carey,* 430 U. S. 144 (1977) (*Carey*). Indeed, in a covered Section 5 jurisdiction, this Court has instructed that a lower court, functioning in lieu of a legislative body, must accomplish race conscious redistricting to avoid abridgment of the right to vote on account of race or color under Section 5 of the Voting Rights Act. *Carey, supra; Beer v. United States,* 425 U. S. 130 (1976).

Not only did the district court here not accomplish a race conscious redistricting, it undertook absolutely no analysis of its own plan under Section 5 of the Voting Rights Act. It made no findings with regard to Section 5 at all. The court completely ignored the impact of its actions on minority voters. Having determined that it would be absolved from analysis of the impact of its plan on the position of minority voters in the state when it found no violation of Section 2 of the Voting Rights Act, the district court asked an unnecessary question, answered it, and then used that answer to justify an impermissible result in redistricting Arizona's congressional districts.

Furthermore, the court's elevation of good government factors to primary consideration, over minority voting rights, allowed the court to fragment the minority population not placed in district 2 among the remaining five districts.[2] Had the court conducted an analysis of its

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[2] Arizona, like most other states, has population concentration pockets surrounded by rural areas with sparse population. The district court's plan anchors all districts in at least one of two major population centers. All districts have both urban and

own plan under the retrogression standards of Section 5, it would have had to conclude that the plan was retrogressive because it created only one majority minority district of six, as compared to the one of five in the State's previous plan, and fragmented the remaining minority population.

III. THE DISTRICT COURT'S ERRONEOUS SECTION 2 DETERMINATION RESTED ON A BLANKET DISAVOWAL OF RACIALLY POLARIZED VOTING WHICH WAS BASED ON INCORRECT STANDARDS AND ITS REJECTION OF UNCONTROVERTED EVIDENCE WITHOUT EXPLANATION

As part and parcel of its finding that no violation of Section 2 of the Voting Rights Act or abridgment of the right to vote because of race had occurred, the district court below found that parties had failed to prove the existence of racially polarized voting in Arizona. App. 8-9a. In very conclusory statements without any detailed explanation, the court found that expert testimony regarding polarization and voting behavior was unpersuasive and that statistical analysis of voting behavior presented by all parties failed to explain voting behavior. App. 7-8a. The court made no finding to explain why it ignored statistical evidence. The court simply said the statistical evidence made no sense to the court. App. 7a. What the court determined did explain the differences it

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rural populations. If the good government criteria were applied in a non-discriminatory manner, two majority minority districts should result.

recognized in voting patterns between Hispanics and non-Hispanics in Arizona elections was party affiliation and the electability of the candidate. App. 7-8a.

Moreover, the court found that the explanations for voter behavior it considered, those of party affiliation, financing of candidates, campaign strategy, etc . . . , should have been considered by the experts who presented unanimous evidence of racially polarized voting. *Id.* The failure of experts to consider those variables, the court concluded, rendered their testimony and supporting evidence unpersuasive. App. 8a.

The district court used an incorrect standard to determine the existence of racially polarized voting. Furthermore, the court's determination was not based on evidence before the court. All evidence presented to the court by all parties regarding racially polarized voting pertained to the degree of polarization, not to the absence of polarization between Hispanic and non-Hispanic voters. Finally, the court failed to explain in any comprehensible manner its reasoning for complete rejection of the uncontroverted record of racially polarized voting in Arizona.[3]

In *Thornburg v. Gingles,* this Court specifically rejected the analysis used by the district court here. The reasons or causations for voting patterns are not relevant to the central inquiry of whether voters of color and white voters vote differently. *Thornburg v. Gingles,* 478

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[3] Hispanic Intervenors presented evidence of cohesion of Hispanics and Native Americans in voting that the district court did not even cite in its opinion.

U.S. 30, 63-4 (1986) (*Thornburg*). All that is relevant is the correlation between the race of a group of voters and their selection of a candidate or candidates. *Id.* This Court concluded that the use of an analysis including the same variables relied on by the district court below for explanations as to differences in voting behavior between ethnic/racial groups "would thwart the goals Congress sought to achieve when it amended Section 2 and would prevent a court from performing a 'functional' analysis of the political process . . . " *Thornburg*, 478 U.S. at 62.

Additional variables, beyond the factor of race or ethnicity, distort the equation. *Thornburg*, 478 U.S. at 64. The analysis of vote dilution and racially polarized voting is a functional, practical one. The crucial inquiry is only the correlation between the race of the voter and the selection of certain candidates. *Thornburg*, 478 U.S. at 74. Once the prima facie case of racially polarized voting through that correlation has been established, it cannot be rebutted with evidence of causation or intent. *Id.*

The district court's findings with regard to racially polarized voting are dismally void of particularity of reasoning and subsidiary factual conclusions. *Westwego Citizens for Better Government v. Westwego*, 872 F.2d 120 (5th Cir. 1989). Having completely dismissed testimony of experts and supporting statistical evidence on the existence of racially polarized voting because they failed to consider causative variables, the court was unable to and failed to perform the functional analysis of racially polarized voting required by *Thornburg*.

While the court acknowledged the evidence was clear that differences existed between voting patterns of Hispanic and white voters, it found that none of the parties had proven a white majority voted sufficiently as a bloc to usually defeat minority preferred candidates. App. 8a. The court referenced no basis for its conclusions other than an unsupported statement that voting behavior of Arizonans is "closely associated with party affiliation." *Id.* That single causative variable, rejected in *Thornburg*, was apparently sufficient for this Court to rebut uncontradicted evidence of racially polarized voting.

The district court apparently relied on its blanket finding that no racially polarized voting exists in Arizona as the support for its determination that no violation of the Voting Rights Act existed which would require remedial action.[4] Its broad disavowal of racially polarized voting, based on erroneous standards, not only impacted the development of the court's plan, but also impacts the future application of Section 5 and Section 2 of the Voting

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[4] Despite determining that no remedial action was required and that polarized voting was not existent, the court's plan created one congressional district in which the combined minority population was 61% of the total population (50.46% Hispanic) for the purposes of complying with the Voting Rights Act and to provide Hispanics access to the political process. App. 10a and 25a. Further, the court fragmented Native American voters by placing Hopis in District 3 where they are 3.26% of the population, rather than in District 6 where Native Americans are 22% of the population. *Id.* That, the Court found, kept Native Americans from being minimized. App. 10a. The Court's apparent contradictory positions with regard to its obligations under the Voting Rights Act lends a taint of arbitrariness to its actions.

Rights Act to the State of Arizona and its political subdivisions, rendering those protections afforded minority voters of the state virtually ineffective. Moreover, the authority of the Department of Justice to carry out its statutory enforcement responsibilities in Arizona is undermined by the district court's erroneous findings.

IV. THE DISTRICT COURT ERRED BY ORDERING INTO EFFECT ITS OWN PERMANENT PLAN FOR ELECTIONS WITHOUT EXIGENT CIRCUMSTANCES AND THEREBY COMPLETELY CIRCUMVENTING SECTION 5 PRECLEARANCE REQUIREMENTS FOR AN ENTIRE DECADE

The circumstances of the failure of the legislature to redistrict placed the district court in the position of acting in the quasi-legislative capacity of selecting a congressional redistricting plan for Arizona. App. 8a. In the proceedings before the court there were no less than five plans offered by parties from which the court could have selected. App. 2a. Rather than selecting one of those plans, however, the court undertook to create its own plan for election by slightly modifying or "refining" a party's plan. App. 17a. Then relying on *McDaniel v. Sanchez*, the district court determined that its plan was not one reflecting the policy choices of the legislature, but was solely the creation of the court and did not require Section 5 preclearance under the Voting Rights Act. App. 18a.

In its April 30, 1992, order, the court made findings of exigent circumstances with regard only to expected precinct changes required by counties to comport with its plan. App. 19-20a. Those exigent circumstances were the

approaching candidate filing period scheduled to begin in twenty six days, ending June 25, 1992, and ballot printing for the August 6, 1992, beginning of absentee voting and September 8, 1992, primary, some three and four months down the road, respectively. App. 20a. Based on those exigent circumstances, the court authorized the interim use of precinct boundary and polling place changes for counties, waiving section 5 preclearance requirements for the 1992 elections, if preclearance was not obtained by June 1, 1992. App. 19a. The court made no such findings with regard to its own plan.

> "The one exception where Section 5 review would not ordinarily be available is where the court, **because of exigent circumstances,** actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor v. Johnson,* 402 U.S. 690 . . . Furthermore, in fashioning the plan the court should follow the appropriate Section 5 standards, including the administrative and judicial precedents developed under Section 5 cases." Senate Report, at 18-19.

McDaniel, 452 U.S. at 149, (emphasis added) (citations omitted). Exigent or emergency circumstances justifying the temporary circumvention of Section 5 requirements are the unusual case and can be accomplished on a temporary basis only. *Terrazas v. Clements,* 537 F.Supp. 514, 538 (N.D. Tex. 1982) (citing *Reynolds v. Sims,* 377 U.S. at 585-87, 84 S.Ct. at 1393-94). "[U]nder certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress,"

equitable considerations might justify a court's circumvention of Section 5, on a temporary basis only. *Id.*[5]

This litigation was filed in early February during the legislative session asserting an impasse in the legislative redistricting process, some eight months before the primary election. At the time of the trial, there were still four and one half months before elections. When the court issued its order adopting a plan for congressional elections, four months remained until the primary. The election process itself was still a month away from opening. The district court did not have and did not cite exigent circumstances authorizing its order of a court drawn plan, rather than selection of a litigant's plan, to avoid the preclearance process. The only exigent circumstances it contemplated were those which might be faced in a month by counties preparing for election. Moreover, the district court's plan was ordered as a permanent plan, to be used by the State through the year 2000.

This litigation was filed during the legislative session as plans were being considered. Once the three judge court was convened, all effort toward producing a legislative congressional redistricting plan stopped.[6] When the

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[5] Under this Court's recent ruling in *Clark v. Roemer*, the circumstances when a court can order unprecleared changes into effect on a temporary basis or circumvent Section 5 preclearance requirements because of an existing emergency would appear to have been narrowed. *Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2098 (1991).

[6] The legislature was, however, able to continue development of its own redistricting plan for legislative districts. App. 2a. The impasse on the congressional redistricting was apparently rendered solid by the demonstrated willingness of the

court acted the legislature was in session and remained in session two more months. The court without deference to the legislature and without an emergency, however, determined to assume the state legislature's responsibilities.

Redistricting and reapportionment are legislative tasks which federal courts should make every effort not to preempt. *Wise*, 437 U.S. at 539. "Legislative bodies should not leave their reapportionment tasks to the federal courts." *Wise*, 437 U.S. at 540. Only when the legislature fails to act or an emergency exists, should federal court's assume the "unwelcome" obligation. *Id.*

The situation with Arizona is exactly what Congress sought to avoid when it strictly limited exceptions to the centralized preclearance process and structure established by Section 5.

> It is true, of course, that the federal interest may be protected by the federal district court presiding over voting rights litigation, but sound reasons support the Committee's view that the normal Section 5 preclearance procedures should nevertheless be followed in cases such as this. The procedures contemplated by the statute reflect a congressional choice in favor of specialized review – either by the Attorney General of the United States or by the United States District of Columbia . . . Moreover, if covered jurisdictions could avoid the normal preclearance process by awaiting litigation challenging a refusal to redistrict after a census is

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district court to undertake the matter quickly despite the ongoing legislative session and by either the Senate or the House's hope for better prospects before the court.

> completed, the statute might have the unintended effect of actually encouraging delay in making changes in district boundaries.

McDaniel, 452 U.S. at 151.

The federal court stepped in, and legislative action came to a screeching halt. The legislature did not address minority voting rights. The court issued an order circumventing Section 5 review of the plan for impact on minority voting rights. Exacerbating the court's erroneous circumvention of Section 5 preclearance review for congressional districts in Arizona was its absolute failure to comply with this Court's mandates in *McDaniel v. Sanchez*, of a Section 5 analysis of its own plan. See discussion, *supra*. Minority voting rights, and Section 5, were completely ignored in the Arizona congressional redistricting.

If the Arizona legislature does not act to redistrict the congressional districts within the decade, the district court's unreviewed court-ordered plan will remain in effect. From what has transpired in the State to date, it is clear that inaction for the Arizona legislature (as with most others) is easier to accomplish than action. Thus, the State of Arizona will be able to avoid Section 5 review of its congressional redistricting plan for the entire decade. In fact, the State may completely avoid review of any change in voting under Section 5 as a result of the district court's order.

CONCLUSION

THE DECISION OF THE COURT BELOW MUST BE REVERSED IN ITS ENTIRETY, AND REMANDED WITH INSTRUCTIONS.

What has occurred with regard to Arizona's congressional redistricting is likely to become the blueprint for jurisdictions throughout the south and southwest, seeking to circumvent Section 5. Jurisdictions like Arizona, will simply not act, delay legislative action until an "emergency" exists, or will block legislation.[7] The result of allowing courts to continue sanctioning Section 5 circumvention by jurisdictions will be the statute's effective repeal.

This frustration of the Voting Rights Act must stop now. It is not only contrary to public policy, it is offensive to public policy.

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[7] In fact, similar situations have already arisen in Houston, Texas, with regard to the city council, and in Texas, Alabama, Florida, and California, with regard to the legislature and congress, for example. Several counties in Texas, Bailey and Castro, are in the process of attempting circumvention of Section 5 through similar strategy.

For the reasons stated, Appellants respectfully request this Court note probable jurisdiction and hear this appeal on an expedited basis.

Dated: August 27, 1992

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, et al., Plaintiffs, vs. J. FIFE SYMINGTON, et al., Defendants.	No. CIV 92-256-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed May 5, 1992)

I. BACKGROUND

A. Procedural History

The total population of Arizona after the 1990 Census was 3,665,228. Decennial Census of Population and Housing, 1990, Publ. L. 94-171 (1991). As a result, Arizona is entitled to an additional congressional representative.[1] The state legislature has the responsibility for redistricting the congressional districts and state legislative districts. Ariz. Const. art. 22, § 12 (representatives to congress shall be elected "at such times and in such manner as may be prescribed by law.").

Pursuant to 28 U.S.C. sections 1331, 1343(3) and (4), and 1357, Plaintiffs, Arizonans for Fair Representation, brought suit in February 1992 when it appeared that the Arizona State Legislature was deadlocked on the issue of redistricting. Named as defendants were the Arizona

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[1] Apportionment Population and State Representation: Communication from the President of the United States, H.D. 102-18, p. 3 (January 7, 1991).

House of Representatives and the Arizona Senate. Arizona's Governor and Secretary of State also were named as nominal defendants.[2]

A three-judge panel was convened pursuant to 28 U.S.C. section 2284(a). After the filing of this suit, the House and the Senate adopted their respective plans, but failed to agree on a single plan.

Arizonans for Fair Representation supports the House plan and opposes the Senate plan. The governor also announced his support for the House plan through an affidavit. As a result, the court realigned the House and the Governor, designating them as plaintiffs along with Arizonans for Fair Representation. The court also allowed three groups to intervene: (1) the Hispanic Chamber of Commerce and the Arizona Hispanic Forum ("Hispanic Intervenors"), (2) several Native American Tribes, and individual Native Americans (the "Indian Intervenors") and (3) Ed Pastor, Congressman for the existing district two ("Congressman Pastor"). Each intervenor submitted its own plan, as required by the court. Additionally, the court authorized amicus curiae status for Peterson Zah (President of the Navajo Nation), the White Mountain Apache Tribe, the Gila River Indian Community and the National Association for the Advancement of Colored People. All of the amici support the Senate Plan.

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[2] Subsequent to filing this lawsuit, the Arizona Legislature passed a bill redistricting the state legislative districts. After the bill was signed by the Governor, it was forwarded to the Department of Justice for preclearance. As a result, the parties agreed to stay the lawsuit with regard to the state legislative redistricting. Thus, the only matter before this Court is the issue of congressional redistricting.

Because of the legislative impasse, the court must adopt or draw a plan which complies with the Constitution, 42 U.S.C. sections 1971 through 1973ff-6 (hereinafter referred to as the "Voting Rights Act"), and the neutral criteria which support the precept of good government. The court heard testimony and received evidence during a five-day trial.

B. Arizona's Physical and Demographic Characteristics

Arizona is unique. Approximately 27 percent of Arizona's land is located on Indian reservations, far and away the highest percentage in the United States. Other large portions of the state are devoted to National Parks and Forests. These factors, in part, account for the fact that Arizona is sparsely populated.

Arizona's urban areas contain the overwhelming bulk of the state's population. Almost 60 percent of Arizona's population is located in the metropolitan Phoenix area. When combined with metropolitan Tucson, over three-quarters of Arizona's population resides within these two urban areas. This is the background against which this court must adopt or draw a plan for Arizona's new congressional districts.

II. STANDARDS

There are three criteria used to evaluate redistricting plans: the Constitution, the Voting Rights Act, and the neutral principles of redistricting. There is a strict hierarchy among these criteria. The Constitution and the

Voting Rights Act must be satisfied before a court considers the neutral criteria.

A. Constitutional Requirements

The "one person, one vote" standard articulated in Article I, Section 2 of the United States Constitution guarantees the right of each citizen to an equal voice in the selection of a representative. *Wesberry v. Sanders*, 376 U.S. 1 (1964). Thus, "one man's vote in a congressional election is to be worth as much as another's." *Id.* at 8. As a result, the population within each state's congressional districts must be as nearly equal as practicable. *Id.* at 7-8. This requires a good-faith effort to achieve precise mathematical equality. Any deviations from precise equality, no matter how small, must be individually justified, unless unavoidable. *Karcher v. Daggett*, 462 U.S. at 725, 731 (1983).

Each of the plans submitted fulfilled this criteria. The maximum population deviation in a district under any of the plans submitted is one person. That deviation was unavoidable because Arizona's total population is not divisible by six.

B. Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended in 1982, prohibits denying protected minorities an equal opportunity to elect representatives of their choice. 42 U.S.C. § 1973. The purpose of the Voting Rights Act is to prohibit stifling of minority political expression

by dilution of the voting strength of recognized minority groups.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court articulated three preconditions to a claim of vote dilution under section 2 of the Voting Rights Act. First, the minority group must be sufficiently large and geographically compact to constitute a voting age majority in a single-member district. Second, the minority group must be politically cohesive. Third, the majority must vote sufficiently as a bloc so that, in the absence of special circumstances, it usually defeats the minority's preferred candidate. *Id.* at 50-51.

Additionally, the Voting Rights Act directs an inquiry under the "totality of the circumstances" test. The Senate Report accompanying the 1982 amendments explained that the amendments were intended to codify the "totality-of-circumstances" standards outlined by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973). Thus, a court can look to the history of discrimination suffered by a minority group, cultural and linguistic barriers to a minority group's participation in the political process, and the number of minority legislators elected to office from a particular state or district. *See Gingles*, 478 U.S. at 75-76 (discussing factors in the Senate Judiciary Committee Report accompanying the 1986 Voting Rights Act).

C. Neutral Criteria

Once the constitutional and Voting Rights Act standards are met, a court may look to several neutral criteria. These criteria are (1) preserving communities of

interest, (2) providing geographically compact and contiguous districts; and (3) avoiding unnecessary or invidious outdistricting of incumbents.

1. preserving communities of interest

A court can determine if the proposed lines preserve communities of interest. *Carstens v. Lamm,* 543 F. Supp. 68, 88 (D. Colo. 1982). This principle is important because it recognizes the importance of shared local experiences and the ability of groups and candidates to "network" within their communities. Thus, a state has a substantial interest in preserving city and county lines. *South Carolina State Conf. of Branches v. Riley,* 533 F. Supp. 1178, 1180 (D. S.C. 1982), *aff'd,* 459 U.S. 1025 (1982). Preserving these communities of interest also enables a congressman to represent his constituency better. Therefore, the aim is to preserve compatible political interests. *See Carstens* 543 F. Supp. at 88; *LaComb v. Growe,* 541 F. Supp. 145, 148 (D. Minn. 1982), *aff'd,* 456 U.S. 966 (1982).

2. geographically compact and contiguous districts

Closely related to preserving communities of interest is the goal of creating geographically compact and contiguous districts. *Riley,* 533 F. Supp. at 1181; *Carstens* 543 F. Supp. at 87-88. Districts that are geographically compact and contiguous are less likely to suffer from the ills of gerrymandering. Furthermore, they assist in maintaining communities of interest.

3. avoiding unnecessary or invidious outdistricting of incumbents

The court also should avoid unnecessary or invidious outdistricting of incumbents. *Riley*, 533 F. Supp. at 1180-81. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.

While these criteria cannot replace those established by the Constitution or federal statutory law, they do provide a guideline for drawing districts that are "politically fair," not only to the elected representatives, but to the constituents they represent.

III. DISCUSSION

The parties have attempted to make this a trial of numbers. Their experts spoke in terms of Bivariant Regression Analysis, Homogeneous Precinct Analysis, Direct Polling, Deviation Analysis, the Circumscribing Circle Test, the Perimeter Circle Test and the Polygon Test, to name a few. This case encompasses far more than that. The testimony of the lay witnesses provided the court with a meaningful interpretation of the cold hard statistics.

Among the lay witnesses, Congressman Ed Pastor, himself an intervenor, stated that finances, the quality of the candidate, campaign strategy, party affiliation and geographical residence of the candidate often played a

major role in the electability of a candidate. State Senators Gutierrez and Rios also testified that quality of a candidate and money were major factors in an election. The experts failed to consider this information in offering their opinions. The court concludes these factors offered greater insight into the voting patterns of Arizonans, which were more helpful than the voting patterns proffered by the parties' experts.

Accordingly, the court also finds that the parties, and particularly the Senate, failed to demonstrate that there has been a denial or an abridgement of the right to vote on account of race or color, requiring remedial action under the Voting Rights Act. As previously mentioned, each party brought in one or more experts to explain Arizonans' voting behavior. The testimony revealed that there are numerous methods of gathering information on polarization. Indeed, there was disagreement among the experts on which method provided the most reliable evidence. The court did not find the experts' opinions in this area persuasive.

It was clear from all of the evidence that there are some differences between the voting patterns of Hispanics and non-Hispanics. However, none of the parties proved that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate. *See Gingles*, 478 U.S. at 48-49 (holding bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group). Instead, the evidence showed that Arizonans' voting behavior is also closely associated with party affiliation. Accordingly, the court finds that the

parties have not satisfied the third prong of the *Gingles* test.

After examining all of the plans, the court finds that the Indian Compromise Plan best meets the constitutional and neutral criteria. Therefore, the Indian Compromise Plan forms the basis for the court-drawn districts.

A. Constitutional

The plan we adopt is faithful to the constitutional requirement of "one person, one vote."[3] Arizona has a total population of 3,665,228 people. Accordingly, the ideal congressional district contains 610,871 people. The court's plan achieves this goal. The slight deviation of one person in some of the districts is due to the fact that Arizona's population is not divisible by six.

B. Voting Rights Act

The plan we adopt also comports with the requirements of the Voting Rights Act by giving Arizona's Hispanic population an opportunity to elect a candidate of their choice in district two. One of the most controversial issues during the trial was the percentage of Hispanics that should be included in district two in order to comply with the Voting Rights Act. Opinions ranged from 40 percent to over 60 percent of the total population.

Under the House plan the voting age population of Hispanics would be 51.1 percent and under the Senate

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[3] It is undisputed that the current congressional districts are unconstitutional.

Plan the voting age population of Hispanics is 44.6 percent. The court plan creates a district where 50.46 percent of the population in district two is Hispanic with an Hispanic voting-age population of 44.77 percent. As previously mentioned, the court finds that there has been unpersuasive evidence showing that the white majority in district two votes sufficiently as a bloc usually to defeat a Hispanic voter's candidate of choice. *See Gingles*, 478 U.S. at 49. Consequently, a congressional district in which Hispanics comprise 50.46 percent of the total population and 44.77 percent of the voting age population is sufficient to provide them access to the political process.

Although there has been no proof that the Native Americans are entitled to a reapportionment plan designed to maximize their political advantage, they should not be engulfed in a structure that minimizes their potential for meaningful access to the political process. The Indian Intervenors proved that there have been widespread practices of discrimination against Native Americans. The court also took judicial notice of that fact. The results achieved through the court's plan will meet the goals of the Indian Intervenors.

The Senate also argues that the failure to make the new district six a second majority-minority district would constitute a violation of the Voting Rights Act. The Senate's argument is founded on the principle that there is a right to proportional representation. No such right exists. 42 U.S.C. § 1973 ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"); *see also Gingles*, 478 U.S. at 46 (by itself, lack of proportional voting does not constitute a violation of the Voting Rights

Act); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). Under any of the proposed plans, district six encompasses hundreds of square miles of sparsely populated areas in the eastern and northern parts of the state. Applying the totality of the circumstances test under the Voting Rights Act, the court finds that adopting the Senate's reasoning would result in block-by-block redistricting over a large geographical portion of Maricopa County. The effect would be the fragmentation and splintering of communities of interest, resulting in an unreasonable gerrymander. *See Gingles*, 478 U.S. at 49.

C. Neutral Criteria

The court next turns its attention to the neutral criteria for drawing congressional districts: (1) geographical compactness and contiguity, (2) preserving communities of interest and existing districts and (3) avoiding the unnecessary and invidious outdistricting of incumbents. *See Carstens*, 543 F.Supp at 87-88; *LaComb*, 541 F. Supp. at 148; *Riley*, 533 F. Supp. at 1180-81.

The court-drawn districts are compact. The plan follows natural boundaries, precinct lines and county lines whenever possible. Unlike the House and Senate plans, the court plan avoids unusual boundary lines. Thus, community interests remain undivided whenever possible and the court plan makes more effective representation possible. *See Carstens*, 543 F. Supp. at 88.

To the extent possible, the court plan also respects the wishes of various communities of interest. Preserving

communities of interest is important because "the sense of community derived from established governmental units tends to foster effective representation." *Id.* Thus, based on testimony from members of the Hopi Reservation, the court placed the Hopi Reservation in district three. Members of the Hopi Reservation testified that they did not want to be placed in the same district as the Navajo Reservation. Indeed, this was the principal reason for their intervention in this lawsuit. The court is well aware of the historical tension and present competition between these two tribes for resources. Out of respect for these differences, the court plan places the Hop Reservation in district three, a position ultimately conceded by all of the parties.[4] The plan further groups those Indian Tribes with similar interests within the same districts and does not split any reservations between districts.

The court also placed Flagstaff in district six to balance out the influence of Maricopa County. Consequently, there will be a broader range of interests represented beyond the interests of Maricopa County. Thus, the court's plan makes more effective representation possible for Arizona citizens living outside of the metropolitan Phoenix area.

The plan further avoids the unnecessary or invidious outdistricting of incumbents. As earlier explained, the maintenance of incumbents provides the constituents with some continuity. Unlike the Senate and Hispanic

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[4] The Court has also included the Moenkopi Hopi land lying northwest of the main reservation. Moenkopi is connected to the main reservation by Highway 264 and is, therefore, contiguous.

plans, the court plan does not outdistrict any of the incumbents.

This plan best serves the interests of the citizens of Arizona. It groups persons with similar interests in the same district while recognizing the need for good government lines. It also provides the Hispanics in district two with an opportunity to influence an election so that they may continue to elect a candidate of their choice.

IV. ANALYSIS OF THE OTHER PLANS

A. The House Plan

The major problem with the House plan is its version of district two. In order to obtain a greater percentage of the Hispanic population, the House plan includes the major Hispanic areas within southern Arizona and Maricopa County. This would create a district with a total minority population of approximately 67 percent, and an Hispanic voting-age population of 51.1 percent. The House argues that such a population is necessary to comply with the Voting Rights Act. However, in light of the testimony, these percentages are unnecessary.

House district two also forces a representative to cover at least three separate media markets and maintain several additional satellite offices. This poses an additional burden on a representative's limited staff and resources. The court finds that it is more reasonable to put the areas of eastern Pinal County and southern Gila County into district six, and to keep southern Cochise County in district five. Stretching district two to include

these areas does not conform to the principle of compactness.

The court also finds that the House plan fails to follow the principle of compactness by including the El Mirage-Surprise area in district two. The inclusion of El Mirage and Surprise in district two adds approximately one percent to the Hispanic population of that district. Although these areas probably have more in common with the citizens in House district two, the court finds no reasonable way to include these communities in district two.

B. The Senate Plan

The main problem with the Senate Plan is its version of district six. On the full state map, the Senate's district six begins in northwestern Arizona near Lake Mead, winding its way through the Navajo and Hopi Reservations in northeastern Arizona, turning south to catch all of Navajo County and most of Apache County, dipping into portions of Graham and Greenlee counties, capturing most of Pinal County, slipping into Pima county to capture East Tucson, and finally ending in Maricopa County.

The most perplexing aspect of this plan is its checkerboard effect in Maricopa County. The Senate's district six winds its way through Queen Creek and Higley and hopscotches block-by-block through Chandler and Mesa. It then traverses South Mountain Park in order to envelop certain precincts in southern Phoenix and Glendale. Testimony indicated that a person driving on one street through Mesa could potentially drive in and out of the Senate districts one and six at least ten times.

Senate district six also completely ignores the ongoing dispute between the Hopis and the Navajos. At the trial, the Senate indicated its willingness to put the Hopi and the Navajo Reservations in separate districts, but offered no suggestion on how to correct the other districts to preserve population equality.

Furthermore, the Senate plan includes Green Valley within district two. Green Valley is a retirement community which was previously located in congressional district five. No other plan has Green Valley in district two. The Hispanic Intervenors and Congressman Pastor specifically object to the inclusion of it in district two. The court agrees that Green Valley should remain in district five.

Consequently, the court finds that the Senate's plan is not conducive to the principles of good government. A representative from the Senate's district six would be hard-pressed to ascertain which neighborhood he or she represented. The Senate plan is the ultimate fragmentation of counties, cities and neighborhoods, and consequently fails to promote the principles of good government. *See Carstens,* 543 F. Supp. at 88; *LaComb,* 541 F. Supp. at 148.

Finally, the Senate plan transgresses another neutral criterion by failing to place incumbents within their own districts. The Senate plan arbitrarily redistricts Congressman Stump, the current representative in district three, into Senate district two. This arbitrary outdistricting violates the good government criteria. *See Riley,* 533 F. Supp. at 1180.

C. The Hispanic Intervenors' Plan

The Hispanic Intervenors' plan closely resembles the Senate's plan with two major exceptions. First, the Hispanics include Green Valley in district five instead of district two. Second, although the Hispanics' version of district six does not have the checkerboard appearance of the Senate's plan, it envelops similar precincts in Maricopa County and splits several communities. The Hispanics' version of district six also includes parts of East Tucson and dips into western Pima County, stopping just above the Mexican border. This virtually splits the Hispanics' district two in half. Further, like the Senate plan, the Hispanic Intervenors unnecessarily fail to include Congressman Stump in their version of district three.

Consequently, the Hispanics' plan, like the Senate plan, is contrary to the principles of good government outlined in the neutral criteria.

D. The Pastor Plan

The Pastor plan shares many of the problems the court found in the Senate and the Hispanic plans. Although the Pastor plan tries to incorporate state legislative district lines in order to carve the Hopi Reservation out of district six, at the trial Congressman Pastor readily acknowledged that the entire Hopi Reservation should be placed within district three. The Pastor plan also creates the checkerboard effect by hopscotching its way through Maricopa County.

E. The Indian Compromise Plan

The Indian Compromise Plan is superior to all other proposed plans and was the best attempt at drawing fair congressional districts. The Indian Compromise Plan includes all of the Hopi Reservation in district three. The Indian Compromise Plan also has all of the incumbents located in their respective districts.

This plan has some substantial differences from the House plan. First, it includes eastern Pinal County and southern Gila County in district six. Second, it includes southern Cochise County in district five. The result is a reduction of the projections that are apparent in all of the other plans.

Despite the merits of the Indian Compromise Plan, the refinements in the court plan make the court's plan superior to all other plans. First, by including Flagstaff in district six, the court plan balances out the interests within the district. Second, by placing the City of Chandler in district one and the less populated, but growing, Gilbert area in district six, the court's plan allows the rural areas to be more competitive in district six. Third, district six should not spill over South Mountain into the Phoenix area for the purpose of including two precincts in South Phoenix. Those two precincts will be better served in district two, where their neighboring precincts are located.

V. FINDINGS

Based on all of the evidence submitted at trial the court finds:

1. There has been insufficient evidence of polarized voting in Arizona to warrant remedial action under the Voting Rights Act.

2. The court plan is superior to all other plans. Given the geography and population of Arizona, the court-drawn districts are virtually equal in population, compact and contiguous, preserve communities of interest to the extent possible and avoid the unnecessary or invidious outdistricting of incumbents;

3. The court plan is not one "reflecting the policy choices of the elected representatives of the people." *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Rather, the plan solely reflects the decision of this court. The plan, therefore, is not subject to preclearance under section five of the Voting Rights Act. *Id.; Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *Connor v. Johnson*, 402 U.S. 690, 691 (1971).

THE COURT FURTHER FINDS that the legislature passed a session law granting the counties authority to designate a convenient number of precincts and define the boundaries of election precincts within thirty days after the enactment of legislative district changes. Laws 1992 (5th Spec. Sess.) Ch. 2. The Legislature also directed that the definitions of precincts be as otherwise prescribed by law, which of necessity includes their establishment within congressional and other boundaries. A.R.S. § 16-411(A).

IT IS THEREFORE ORDERED that:

1. The court plan be implemented. Appendix A accurately describes the districts according to the voter tabulation districts and census blocks. The maps, attached as

Appendix B, are a true and accurate description of the court's plan. Appendix C accurately describes the demographic characteristics of the court's plan.

2. Based on the legislative intent to give the counties additional time to comply with their duties to establish precincts, the court shall grant the counties until 5:00 p.m., Monday, May 18, 1992 to comply with A.R.S. section 16-411(A) and to submit those precinct boundary changes to the Department of Justice for preclearance.

3. If preclearance of any precinct boundary changes is not received by June 1, 1992, the court authorizes interim use of precinct boundaries in the 1992 primary and general elections and such other elections as may follow until the precinct lines are precleared. 28 C.F.R. § (b), (c). The interim use of the precinct boundaries as set forth in 28 C.F.R. section 51.18 is expressly conditioned upon each county filing an affidavit with this court certifying it submitted precinct boundary changes to the Department of Justice, pursuant to the relevant parts of 28 C.F.R. sections 51.26 through 51.28. The precinct and polling place changes still are subject to section 5 review by the Department of Justice even though the court authorizes their emergency interim use. 28 C.F.R. § 51.18(b), (c).

The interim use is necessitated by the "proximity of a forthcoming election and the mechanics and complexities of the state's election laws." *Terrazas v. Clements*, 537 F. Supp. 514, 537 (N.D. Tex. 1982). First, the period for filing candidate nominating petitions begins on May 26, 1992 and ends on June 25, 1992. A.R.S. §§ 16-311, 16-314. Second, in order to determine the eligibility of candidates and those who signed their nominating petitions, all

boundary lines must be established. *See* A.R.S. § 16-314. Third, all matters pertaining to candidate qualification must be resolved before ballots can be printed. A.R.S. §§ 16-314, 16-351. Fourth, ballots must be printed and available for absentee voting, which begins on August 6, 1992. A.R.S. §§ 16-542, 16-545. The absentee and regular ballots must be identical. A.R.S. § 16-545(A). Fifth, the primary election is scheduled for September 8, 1992. A.R.S. §§ 16-201, 16-211. Given the compressed nature of Arizona's election schedule and to avoid further delays which may disenfranchise or confuse voters, the court chooses to order the interim use of precinct boundaries rather than modify the aforementioned dates.

4. The court retains jurisdiction over this case for purposes of issuing any orders necessary for executing the court-drawn plan. The court also retains jurisdiction over the redistricting of the state legislature until a legislative redistricting plan is precleared by the Department of Justice.

5. The court plan will remain in effect for all congressional elections through the year 2000, unless the Arizona Legislature enacts its own plan which meets the requirements of federal law, providing that no such plan be applied to any election unless it has been precleared sufficiently in advance to permit its implementation by the affected counties.

6. The Arizona House and Senate shall provide technical assistance to the Arizona counties in implementing the court plan.

7. By stipulation of the parties and court order, Alan Maguire and Tony Sissons functioned as special technical

advisors to the court for the purpose of drawing the court's plan. Again by stipulation and court order, Lisa Hauser, Assistant Attorney General, served as special counsel to the court on Arizona election laws and procedures for the purpose of implementing the court plan for the 1992 primary and general elections. As special advisors to the court, these individuals are prohibited from discussing any aspect of their consultation with the court. However, nothing in this order shall prevent these individuals from carrying out their respective duties or representation of their clients. The House and Senate shall be responsible for paying the fees of Tony Sissons and Alan Maguire.

DATED this 30th day of April, 1992.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States
District Judge

/s/ Alfredo C. Marquez
Alfredo C. Marquez
United States
District Judge

/s/ Charles E. Wiggins
Charles E. Wiggins
United States
Circuit Judge

Copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, et al., Plaintiffs, vs. J. FIFE SYMINGTON, et al., Defendants.	No. CIV 92-256-PHX-SMM **ORDER OF AMENDED APPENDICES** (Filed May 6, 1992)

The court's written memorandum of Decision filed on May 5, 1992 is the controlling factor in the court's congressional redistricting plan. Due to an inconsistency between the written order and one of the maps describing the court's plan in the appendices IT IS ORDERED that the attached amended appendices replace the appendices filed with the order on May 5, 1992.

DATED this 6th day of May, 1992.

/s/ Stephen M. McNamee
United States
District Judge

copies to all counsel

ARIZONA CONGRESSIONAL DISTRICTS

	1	2	3	4	5	6
Population						
White	530,941	367,125	534,991	562,888	537,525	429,716
Black	19,280	41,578	11,849	11,434	18,172	8,211
Am. Indian	10,281	27,762	19,928	7,407	5,468	132,681
Asian	14,290	7,712	6,791	10,840	11,522	4,051
Other	36,080	166,694	37,312	18,302	38,184	36,213
TOTAL	610,872	610,871	610,871	610,871	610,871	610,872
Hispanic	80,350	308,256	72,113	47,468	100,874	79,277
NH White	488,838	233,088	502,004	534,772	476,765	390,718
NH Black	18,506	38,897	11,314	11,021	17,243	7,828
NH Am. Indian	8,897	22,518	18,520	6,860	4,458	128,838
NH Asian	13,672	6,500	6,284	10,334	10,927	3,813
NH Other	609	1,612	636	416	604	398
TOTAL	610,872	610,871	610,871	610,971	610,871	610,872

ARIZONA CONGRESSIONAL DISTRICTS – Continued

	1	2	3	4	5	6
Voting Age Population						
White	405,512	266,981	411,248	432,519	416,349	319,570
Black	12,813	27,038	7,518	7,503	12,236	5,467
Am. Indian	6,518	16,319	11,934	4,858	3,800	74,600
Asian	10,548	5,634	4,643	7,720	8,417	2,763
Other	22,584	98,309	21,950	11,779	24,568	22,411
TOTAL	457,975	414,281	457,293	464,379	465,370	424,811
Hispanic	50,673	185,458	42,853	30,792	65,169	48,019
NH White	378,607	183,797	391,309	414,148	376,887	295,607
NH Black	12,387	25,612	7,247	7,292	11,742	5,273
NH Am. Indian	5,816	13,547	11,218	4,573	3,212	73,060
NH Asian	10,139	4,880	4,347	7,362	8,059	2,615
NH Other	353	987	319	212	301	237
TOTAL	457,975	414,281	457,293	464,379	465,370	424,811
Registration						
Democrats	112,800	134,200	117,100	116,500	156,100	139,700
Republicans	169,500	59,800	170,400	189,200	150,700	129,100
Other	39,200	23,000	33,800	40,300	45,000	26,400
TOTAL	321,500	217,000	321,300	346,000	351,800	295,200

Information reflects 1990 Census data and 1990 voter registration

ARIZONA CONGRESSIONAL DISTRICTS

	1	2	3	4	5	6
Population						
White	86.92%	60.10%	87.58%	92.15%	87.99%	70.34%
Black	3.16%	6.81%	1.94%	1.87%	2.97%	1.34%
Am. Indian	1.68%	4.54%	3.26%	1.21%	0.90%	21.72%
Asian	2.34%	1.26%	1.11%	1.77%	1.89%	0.66%
Other	5.91%	27.29%	6.11%	3.00%	6.25%	5.93%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Hispanic	13.15%	50.46%	11.80%	7.77%	16.51%	12.98%
NH White	80.02%	38.16%	82.18%	87.54%	78.05%	63.96%
NH Black	3.03%	6.37%	1.85%	1.80%	2.82%	1.28%
NH Am. Indian	1.46%	3.69%	3.03%	1.12%	0.73%	21.09%
NH Asian	2.24%	1.06%	1.03%	1.69%	1.79%	0.62%
NH Other	0.10%	0.26%	0.10%	0.07%	0.10%	0.07%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

ARIZONA CONGRESSIONAL DISTRICTS – Continued

	1	2	3	4	5	6
Voting Age Population						
White	88.54%	64.44%	89.93%	93.14%	89.47%	75.23%
Black	2.80%	6.53%	1.64%	1.62%	2.63%	1.29%
Am. Indian	1.42%	3.94%	2.61%	1.05%	0.82%	17.56%
Asian	2.30%	1.36%	1.02%	1.66%	1.81%	0.65%
Other	4.93%	23.73%	4.80%	2.54%	5.28%	5.28%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Hispanic	11.06%	44.77%	9.37%	6.63%	14.00%	11.30%
NH White	82.67%	44.37%	85.57%	89.18%	80.99%	69.59%
NH Black	2.70%	6.18%	1.58%	1.57%	2.52%	1.24%
NH Am. Indian	1.27%	3.27%	2.45%	0.98%	0.69%	17.20%
NH Asian	2.21%	1.18%	0.95%	1.59%	1.73%	0.62%
NH Other	0.08%	0.24%	0.07%	0.05%	0.06%	0.06%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Registration						
Democrats	35.10%	61.80%	36.40%	33.70%	44.40%	47.30%
Republicans	52.70%	27.60%	53.00%	54.70%	42.80%	43.70%
Other	12.20%	10.60%	10.50%	11.60%	12.80%	8.90%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Registration totals may not add due to rounding.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY, Plaintiffs, vs. J. FIFE SYMINGTON, Governor of the State of Arizona; RICHARD D. MAHONEY, Secretary of State of the State of Arizona; ARIZONA HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE, Defendants.	**NO. CIV 92-0256 PHX SMM** **NOTICE OF APPEAL** (Filed May 29, 1992)

Hispanic Chamber of Commerce, Arizona Hispanic Community Forum, Edward Valenzuela, Richard Zazueta and Valerie Ann Vidal, Plaintiff/Intervenors herein (collectively, "Hispanic Intervenors"), hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on April 30, 1992, and lodged on May 5, 1992.

This appeal is taken pursuant to 28 U.S.C. § 1253.

RESPECTFULLY SUBMITTED this 28 day of May, 1992.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY, Plaintiffs, ED PASTOR; HISPANIC CHAMBER OF COMMERCE INC., ARIZONA HISPANIC COMMUNITY FORUM, EDWARD VALENZUELA, RICHARD ZAZUETA, VALERIE ANN VIDAL; THE SAN CARLOS APACHE TRIBE, a Federally Recognized Indian Tribe, and RALEIGH THOMPSON, Chairman, and BURNETTE ROPE, Vice Chairman, and as Individual Tribal	**NO. CIV 92-0256 PHX SMM** **HISPANIC PLAINTIFFS/ INTERVENORS AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES** (Filed June 1, 1992)

Members, VERNON MASAYESVA, Chairman, LORIS MINKLER and WAYNE TAYLOR, JR., Individual Tribal Members of The Hopi Indian Tribe, a Federally Recognized Indian Tribe, THE TONTO APACHE TRIBE, a Federally Recognized Indian Tribe, LOUISE C. LOPEZ, Chairman, JERI JOHNSON, Vice Chairman, and as Individual Tribal Members, YAVAPAI-APACHE INDIAN COMMUNITY, CAMP VERDE RESERVATION, DAVID KWAIL, Chairman, STANLEY JACKSON, Vice Chairman, and as Individual Tribal Members, THE HAVASUPAI TRIBE, a Federally Recognized Indian Tribe, DON WATAHOMIGIE, Chairman, THOMAS SIYUJA, SR., Vice Chairman, and as Individual Tribal Members, THE COCOPAH INDIAN TRIBE, a Federally Recognized Indian Tribe, PETE SOTOS, Individual Tribal Member,

Plaintiffs/Intervenors,

vs.

J. FIFE SYMINGTON, Governor of the State of Arizona; RICHARD D. MAHONEY, Secretary of State of the State of Arizona; ARIZONA STATE HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE,

Defendants.

Hispanic Chamber of Commerce, Arizona Hispanic Community Forum, Edward Valenzuela, Richard Zazueta and Valerie Ann Vidal, Plaintiff/Intervenors herein (collectively, "Hispanic Intervenors"), hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on April 30, 1992, and lodged on May 5, 1992.

This appeal is taken pursuant to 28 U.S.C. § 1253.

RESPECTFULLY SUBMITTED this 1st day of June, 1992.

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(2) (2)

Nos. 92-362 and 92-375

IN THE

Supreme Court of the United States

October Term, 1992

Arizona State Senate, Hispanic Chamber of Commerce, et al.,
Appellants,

v.

Arizonans for Fair Representation, et al.,
Appellees.

Appeal From The United States District Court For The District Of Arizona

MOTION TO AFFIRM

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Assuming, *arguendo*, that appellants showed that a second minority district could be formed in the additional district apportioned to the State of Arizona following the decennial census, does a congressional redistricting plan violate the retrogression standard of section 5 of the Voting Rights Act of 1965, as amended, where the absolute number of minority districts remains the same but the percentage of minority districts are proportionately less than before the reapportionment?

2. In a proceeding to adopt congressional districts because of a legislative deadlock, was it reversible error for the district court to find that none of the parties had proven a violation of the Voting Rights Act of 1965, as amended, in determining which plan to adopt?

3. In a proceeding where a district court adopts a congressional redistricting plan in the face of a legislative deadlock, was it necessary to make findings pursuant to Rule 52(a), Federal Rules of Civil Procedure, as to the evidence concerning each element of a violation of the Voting Rights Act, or was it sufficient for the court to make findings as to which plan best satisfied the requirements of the U.S. Constitution, the Voting Rights Act, and neutral redistricting criteria?

RULE 29.1 Statement

Appellee Arizonans for Fair Representation, Inc. is an Arizona non-profit corporation and has no parent or subsidiary.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
COUNTER-STATEMENT OF THE CASE	3
A. The Proceeding Below	3
B. The District Court's Opinion	3
C. Appellees Disagree With The Senate's Characterization Of The District Court's Decision	7
REASONS FOR SUMMARY AFFIRMANCE	9
I. THE DISTRICT COURT'S REDISTRICTING PLAN DOES NOT CONSTITUTE UNLAWFUL RETROGRESSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT	12
II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE LAWFULNESS OF THE COURT-ADOPTED PLAN	18
A. The District Court Did Not Misapply The Voting Rights Act.	19
B. Even Assuming, Arguendo, That The District Court Erroneously Required Proof of A Violation Of The Voting Rights Act, It Was Harmless Error Because Appellants Fail To Show That The Court-Adopted Plan Violates The Law.	21
C. Voinovich v. Quilter Is Irrelevant To The Instant Case.	22
III. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE ADEQUACY OF THE DISTRICT COURT'S FINDINGS	22

Page

IV. THE OTHER ISSUES PRESENTED BY APPELLANTS ARE NOT PROPERLY BEFORE THIS COURT 24

A. There Is No Issue Whether Neutral Redistricting Criteria Were Elevated Over Consideration Of Minority Voting Rights 24

B. There is No Issue As To Whether The Court Erred In Its Findings Concerning Racial Bloc Voting. 27

C. There Is No Issue As To Whether The District Court Ordered Its Plan Into Effect Without A Finding Of Exigent Circumstances 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Beer v. United States, 425 U.S. 130 (1976) 12, 13-14, 15

Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992) 15, 24

City of Lockhart v. United States, 460 U.S. 125 (1983) 13

City of Port Arthur v. United States, 459 U.S. 159 (1982) 15-16, 17

City of Richmond v. United States, 422 U.S. 358 (1975) . .12, 17

Fusari v. Steinberg, 419 U.S. 379 (1975) 21

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 19

Good v. Austin, ___ F. Supp. ___, 1992 W.L. 173862 (E.D. Mich. 1992) 13, 23

Hastert v. State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) 23

Jaffke v. Dunham, 352 U.S. 280 (1957) 21

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) 13, 14-15

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983), *aff'd sub nom., Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) 25

McDaniel v. Sanchez, 452 U.S. 130 (1981) 29

McMillan v. Escambia County, Florida, 559 F. Supp. 720 (N.D. Fla. 1983), *cert. denied*, 464 U.S. 830 (1983) 18

O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982) . . .21, 25

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) . . .10

Shayer v. Kirkpatrick, 541 F. Supp. 922 (W.D. Mo. 1982) . . .25

Terrazas v. Slagle, 789 F. Supp. 828 (W.D. Tex. 1991) 15

Page(s)

Thornburg v. Gingles, 478 U.S. 30 (1986) 18, 19, 20, 27, 28

Upham v. Seamon, 456 U.S. 37 (1982) 25, 26

Velasquez v. City of Abilene, Texas, 725 F.2d 1017 (5th Cir. 1984) 23

Voinovich v. Quilter, 794 F. Supp. 695 (N.D. Ohio), *vacated in part on other grounds*, 794 F. Supp. 760 (N.D. Ohio), *prob. jur. noted*, 112 S. Ct 2299 (1992) 22

White v. Weiser, 412 U.S. 783 (1973) 26

Wilson v. Eu, 1 Cal. Rptr. 4th 707 (1992) 23

Constitutional Provisions

U.S. Constitution, Article I, Section 2 4

Statutes

2 U.S.C. § 2a 17

A.R.S. § 16-311 . . . . . .3, 29

A.R.S. § 16-314 . . . . . .3, 29

Voting Rights Act, Section 2, 42 U.S.C. § 1973(b) 10

Voting Rights Act, Section 5, 42 U.S.C. § 1973c . . .10, 13, 17

Rules and Regulations

28 C.F.R. § 51.54(a) 13

Federal Rules of Civil Procedure, Rule 52(a) 23

Rules of the Supreme Court of the United States, Rule 18.6 21

Nos. 92-362 and 92-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARIZONA STATE SENATE,
HISPANIC CHAMBER OF COMMERCE, ET AL.,
Appellants,

v.

ARIZONANS FOR FAIR REPRESENTATION, ET AL.,
Appellees.

Appeal From The United States District Court For The District Of Arizona

MOTION TO AFFIRM

Appellees, the Arizona State House of Representatives, Governor J. Fife Symington, Arizonans for Fair Representation, Inc., Paul Fannin, John Mawhinney, and Stan Turley, for the reasons detailed herein, move to affirm the judgment of the district court on the grounds that the instant appeals of the Arizona State Senate (the "Senate") and the Hispanic Chamber of Commerce (the "Hispanic Chamber")[1] raise no substantial questions that warrant further argument and that the judgment of the court below was correct.

Reduced to their essence, these appeals attack the unanimous decision of the three-judge district court to adopt a congressional redistricting plan that enhances Hispanics' opportunity to elect the representative of their choice in one district but which declined to create what the district court

[1] For convenience, this motion will refer to all of the Hispanic appellants (the Hispanic Chamber of Commerce, the Hispanic Community Forum, Edward Valenzuela, Richard Zazueta, and Valerie Ann Vidal) as the "Hispanic Chamber."

termed "an unreasonable gerrymander" (with a 21% Democratic Party registration edge) in a second district. Although appellants characterized it as a second "majority minority district," it only had a Hispanic voting age population of 19% and a *combined* minority voting age population of at best 43.6%, *and*

- appellants never showed that the various minority groups were politically cohesive such that they could be aggregated,
- such a district required a classic gerrymander that joined geographically distant communities and, in the court's words, required "block-by-block redistricting over a large geographic portion of Maricopa County" so as to pull various precincts into the district, the effect of which was "the fragmentation and splintering of communities of interest," and
- the evidence at trial showed that the district, as proposed by the Senate (and largely copied by the Hispanic Chamber), was designed by an Anglo State Senator who was interested in running in the "minority" district he created.

Appellants claim the court's plan constitutes retrogression under the Voting Rights Act because it allegedly does not "fairly reflect the voting strength" of the *combined* minority population of the State. However, Section 2 of the Voting Rights Act expressly disavows the right to proportional representation, and in any event, the court's plan created one Hispanic district out of Arizona's six congressional seats (16.7% of the seats), giving Hispanics, who constitute 15.7% of Arizona's voting age population, their proportionate share of the seats.

Despite several other claims of error concerning the Voting Rights Act, nowhere do appellants contend — nor do they make any showing — that as a consequence, the court-adopted plan violates the Voting Rights Act. Accordingly, the judgment of the court below should be summarily affirmed.

COUNTER-STATEMENT OF THE CASE

A. The Proceeding Below

Following the 1990 decennial census, Arizona became entitled to six congressional districts, up from five districts during the 1980's. (See Pretrial Order, p. 4). The 1990 census disclosed that 18.8% of Arizona's population was Hispanic, 5.5% was Native American, and 3% was African American. (*Id.* at p. 5).

Efforts at congressional redistricting, however, were stymied when the Democratic-controlled Senate and the Republican-controlled House deadlocked. On February 7, 1992, with the commencement date for filing candidate nominating petitions less than four months away, *see* A.R.S. §§ 16-311, 16-314, plaintiffs — Arizonans for Fair Representation and various individuals — brought this action in the United States District Court for the District of Arizona requesting the court to implement a congressional (and state legislative redistricting plan)[2] in time for the 1992 elections.

By order filed March 3, 1992, the district court scheduled the trial to commence on April 13, 1992, and set deadlines for the parties to file their proposed redistricting plans, for others to intervene in the action, and for the exchange of discovery and witness statements.

B. The District Court's Opinion

On May 5, 1992, following a 4½-day trial, the district court filed a memorandum of decision and order. In a 3-0 decision, it adopted a congressional redistricting plan based on a plan submitted by the appellee Native American intervenors (known as

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[2] At the time, the State Legislature had not passed a state legislative redistricting plan, but subsequently one was enacted and proceedings as to the state legislative districts were stayed pending preclearance by the Department of Justice. A subsequent objection by the Department of Justice resulted in the district court ordering interim state legislative districts for the 1992 elections. A separate appeal has been taken from that order by the Hispanic Chamber of Commerce. However, the instant appeals do not address the state legislative districts.

the "Indian Compromise Plan"),[3] which the court further modified.

In considering each of the plans proposed — and contrary to appellants' arguments — the court recognized a "strict hierarchy" among the criteria used to evaluate redistricting plans: It ruled that the U.S. Constitution and the Voting Rights Act must be satisfied before a court considers neutral redistricting criteria. (Opinion at 4A).[4]

Since each of the plans had a maximum population deviation between districts of only one person — thereby satisfying the constitutional standard for equality of population among districts as required by Article I, Section 2 of the U.S. Constitution — the primary issues litigated before the court were (i) each plan's compliance with the Voting Rights Act, and (ii) in the event of compliance, its satisfaction with neutral principles of redistricting. The Voting Rights Act issues primarily concerned districts 2 and 6, the two districts with the potential for having the largest minority populations.

With respect to district 2, the key issue was whether the proportion of the Hispanic voting age population in that district should be over 50%, as proposed by the appellee House or around 45% as proposed by appellants (the Senate and Hispanic Chamber) and the appellee Indian intervenors. (*See* Senate Exh. 109 and Opinion at 13A). The district court found that "there has been unpersuasive evidence showing that the white majority in district two votes sufficiently as a bloc usually to defeat a Hispanic voter's candidate of choice" and therefore concluded that a 44.7% Hispanic voting age population and a

---

[3] The court permitted several Native American Tribes and individual Native Americans to intervene. For convenience, they will be referred to herein as the "Indian intervenors."

[4] All references to the court's opinion will cite to the reproduction of the opinion in appendix A of the Senate's Jurisdictional Statement. For convenience, references in this brief will refer to "Opinion at ___." However, please note that the Hispanic Chamber's reproduction of the court's opinion also includes the court's appendix showing the statistical breakdown of each district by population and minority group.

50.46% overall Hispanic population was sufficient to provide them access to the political process. (Opinion at 10A). This accorded with the appellants' position, who do not challenge the court's determination of this issue on appeal.[5]

With respect to Arizona's new district, district 6, the appellant Senate proposed a district with an *aggregate* 43.5% minority voting age population.[6] Appellant Hispanic Chamber proposed a similarly configured district with an aggregate 43.6% minority voting age population. However, to achieve this aggregate, the Senate's district 6 had to begin in *northwestern* Arizona near Lake Mead, winding its way through the Navajo and Hopi Reservations in *northeastern* Arizona, and turning south to capture East Tucson in Pima County in the *south,* and finally ending in Maricopa County, where it "hopscotches block-by-block" through portions of Maricopa County, taking various precincts from Chandler, Mesa, southern Phoenix, and Glendale. (Opinion at 14A). A reproduction of the Senate's proposed district is set forth in Appendix A herein.

The district court concluded that "[t]he Senate plan is the ultimate fragmentation of counties, cities and neighborhoods, and consequently fails to promote the principles of good government" (Opinion at 15A), and further found:

> Applying the totality of the circumstances test under the Voting Rights Act, the court finds that adopting the Senate's reasoning [calling for a proportionate number of minority districts] would result in block-by-block redistricting over a large geographical portion of Maricopa County. The effect would be the fragmentation and splintering of communities of interest, resulting in

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[5] The court-adopted district 2 has a Hispanic voting age population of 44.77%. This was only .17% more than that proposed by the Senate (which had proposed a Hispanic voting age population of 44.6%) and only .53% less than that proposed by the Hispanic Chamber (which had proposed a Hispanic voting age population of 45.3%). (See Senate exh. 109).

[6] The Senate's 43.5% aggregate minority voting age population consisted of 4.3% for African Americans, 20.1% for Native Americans, and 19.1% for Hispanics. (See Senate exh. 109).

an unreasonable gerrymander. *See Gingles,* 478 U.S. at 49.

Opinion at 11A.

Indeed, testimony at trial demonstrated that the Senate's plan fragmented the Hispanic community around 16th Street in Phoenix between districts 2 and 6, cut off the Hispanic population in Guadalupe from the nearby Hispanic communities to the west, alternated between districts 1 and 6 on a block-by-block basis through Mesa and Gilbert, and split Queen Creek (TT 4/13/92 at pp. 120-122, 134, 149-151), ultimately creating a district with a 21% Democratic registration edge. (Senate exh. 109). The evidence at trial also showed that the Senate's district 6 was designed by an Anglo State Senator who admitted that he was interested in running in the purported "minority" district that he had formed. (TT 4/14/92 at 199-201, 203). Significantly, the overwhelming evidence at trial, including from appellants' experts, showed that the minority groups were not politically cohesive and could cancel each other out in favor of an Anglo candidate. (TT 4/12/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-86; TT 4/16/92 at 117-119). Indeed, the results of a survey in district 6's area found that of those who expressed a view, not a single Indian would vote for a Hispanic but 46% would vote for an Anglo. (TT 4/13/92 at 83). Even appellants' experts' analyses showed a lack of cohesiveness among Indians and Hispanics in the Democratic primary elections (TT 4/16/92 at 118), although the groups tended to vote Democratic in the general election.

The Hispanic Chamber's plan closely resembled the Senate's plan, except it did not have as much of the "checkerboard appearance of the Senate's plan." (Opinion at 16A). Nonetheless, it moved in a long-ranging and contorted fashion, starting in *northwestern* Arizona, "envelop[ing] similar precincts in Maricopa County and split[ing] several communities," incorporating parts of East Tucson in the *south*, dipping into western Pima County "stopping just above the Mexican border" and virtually splitting the Hispanic's district 2 "in half." *Id.* A copy of the Hispanic Chamber's district 6 is attached as Appendix B hereto.

In contrast, the court's plan resulted in a district 6, which did *not* "spill over South Mountain into the Phoenix area for the purpose of including . . . precincts in South Phoenix." (Opinion at 17A). Flagstaff and Gilbert were not fragmented but placed in district 6. *Id.* It maintained the maximum number of Indian reservations possible within the district pursuant to the wishes of those Native American groups. Testimony at trial suggested that a politically competitive "swing" district, like the court's, would give Native Americans a greater influence in an election than if they were a minority in a predominantly Democratic-registered district. (TT 4/13/92 at 151-152; 4/14/92 at 86-88). Finally, unlike the Senate and the Hispanic Chamber's proposed plans, the court's plan did not include the Hopi Reservation in district 6 in accordance with the wishes of the Hopi's, a position that all parties ultimately conceded. (Opinion at 11A-12A).

C. Appellees Disagree With The Senate's Characterization Of The District Court's Decision

Appellant Senate's Jurisdictional Statement mischaracterizes the decision of the court below in a number of respects. First, the Senate argues that as a result of the court's plan, "Arizona's remaining Hispanic population is scattered among the five other congressional districts so that it comprises no more than 16.51% of the total population of any single district . . . other than District 2." (Senate's Jur. State., p. 6, also p. 4). However, (i) this is only 5% less than what an "unreasonable gerrymander" could achieve, and (ii) there was no evidence that the court's plan, or the Indian Compromise Plan on which it was based, "scattered" the Hispanic population. To the contrary, the court's plan avoids fragmentation of geographically compact Hispanic communities in contrast to the Senate's plan, which the court found was "the ultimate fragmentation of counties, cities and neighborhoods." (Opinion at 15A). Indeed, the evidence at trial revealed that it was the Senate that fragmented the Hispanic community in Maricopa County among districts. (TT 4/13/92 at 120-122, 149-151; 4/14/92 at 64-65).

Second, appellant Senate argues that "[t]he primary disagreement among the litigants was over the degree of bloc voting

and over the consequent ability of a redistricting plan to provide two, rather than one, districts in which minorities would have an equal opportunity to elect representatives of their choice." (Senate's Jur. State., p. 5). In fact, while there was evidence of some racial polarization in Arizona, there was no evidence that racial bloc voting *defeated* the minority's preferred candidate. The Hispanic President of the Senate testified that he received 50% of the Anglo vote in his elections in his district (TT 4/15/92 evening session at 17), and another Hispanic Senator testified that the majority of Anglos voted for him against an Anglo. (TT 4/15/92 at 206-207). Indeed, over the past two decades, Arizona has elected a Hispanic Governor, a Hispanic congressman, and a number of Hispanic, African American, and Native American state legislators. The district court found — and appellants do not challenge here — that "none of the parties proved that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate." (Opinion at 8A).[7]

Instead, a primary disagreement at trial was whether the appellants' aggregation of African Americans, Hispanics, and Indians, totalling 43.5% of the voting age population in the appellants' proposed district 6, was justified on the basis of political cohesiveness among those groups. The overwhelming evidence, including from appellants' own experts on cross-examination, was that there was little cohesion among these groups. (TT 4/13/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-84; 4/16/92 at 117-119).[8]

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[7] Dr. Brischetto, the Hispanic Chamber's expert, testified that 33% to 43% of Anglos crossed over to vote for minority candidates based on an examination of three *statewide* elections. (TT 4/16/92 at 98). However, "courts must not *rely* on data aggregated from all challenged districts in concluding that racially polarized voting exists in each district." *Thornburg v. Gingles*, 478 U.S. 30, 59 n. 28 (1986). Still, on the basis of that testimony, the minority population in the court's district 6 could elect the representative of their choice.

[8] In their Jurisdictional Statements, both the Senate and the Hispanic Chamber claim that they presented evidence that relevant minority groups voted cohesively and thus could be considered together. (Senate's Jur. State., p. 4. n. 6; Hispanic Chamber's Jur. State., p. 11 n. 3). However, their Jurisdictional Statements do not cite to any evidence to support this position, and the evidence at trial did not support it.

Accordingly, the primary disagreement at trial was the proper configuration of District 6: whether it should encompass geographically compact minority groups, or affirmatively seek to maximize an *aggregated* minority population through a checkerboard, block-by-block redistricting, which itself splintered communities, particularly the Hispanic community in Maricopa County.

Third, the appellant Senate argues that in adopting its plan "the court below gave no reasons grounded in the policy of the Voting Rights Act for rejecting the three plans before it that would have created a second congressional district in which minorities would constitute a majority or close to a majority of the population." (Senate's Jur. State., p. 6).

To the contrary, the court not only gave its reasons for rejecting each of the other plans, but it specifically rejected the Senate's and the Hispanic Chamber's argument that there ought to be a second majority-minority district based on a purported right to proportional representation under the Voting Rights Act, noting that it would fragment and splinter communities of interest "resulting in an unreasonable gerrymander." (Opinion at 11A).

REASONS FOR SUMMARY AFFIRMANCE

The thrust of the appellants' attack on the district court's congressional redistricting plan is that the court was obligated to gerrymander Arizona's sixth congressional district so as to create a second district in which minorities would purportedly have an opportunity to elect the representative of their choice.

Yet, appellants never proved that a second such district could be created: Even through "an unreasonable gerrymander" (as the court characterized it), appellants could only create a district with a combined minority voting age of at best 43.6% and did not prove that the different minority groups were politically

cohesive such that they could be aggregated.[9] Nor did they show that racial bloc voting usually defeated the minorities' preferred candidate. (Opinion at 8A).

Nonetheless, appellants contend that the court's decision not to create a second "minority" district, assuming *arguendo* that such a district could be formed, constitutes retrogression under Section 5 of the Voting Rights Act. They argue that the district court failed to create minority districts in proportion to minorities' overall percentage of the population and that the percentage of minority districts declined from one of five districts to one of six after Arizona was apportioned an additional seat, thereby constituting retrogression.

Neither of these points constitutes a substantial question. No obligation exists to create minority districts in proportion to minorities' percentage of a jurisdiction's population. Indeed, Section 2 of the Voting Rights Act disavows any such obligation: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). In any event, the court's plan granted Hispanics proportional representation: Hispanics represent 15.5% of Arizona's voting age population, and one Hispanic district out of six districts amounts to 16.67% of the districts.

Appellants' other contention — that the percentage of minority districts declined from one of five to one of six districts — was the direct result of the *federal* reapportionment, and the Voting Rights Act is only intended to prohibit discriminatory voting changes by the *states*. Retrogression results only when a *state's* redistricting makes a protected minority population worse off. Here, the state's redistricting did not reduce the absolute

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[9] Throughout this motion, the *voting age* population, rather than the total population, of protected minority groups will be cited because the overwhelming weight of authority holds that the eligible voting age population of a particular minority, not its total population, is the proper basis for determining whether the minority group is sufficiently large to have the potential to elect the candidate of its choice. *See, e.g., Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989).

number of congressional seats in which minorities have the opportunity to elect the representative of their choice, and Hispanics' share of those seats remained proportionate to their percentage of the voting age population.

In any event, save for their argument on proportionality, appellants fail to contend that the court's redistricting plan violates the Voting Rights Act, or any other law for that matter. Indeed, the court found — and appellants do not dispute — that the parties failed to show a violation of the Voting Rights Act. (Opinion at 8A to 9A). Although appellants argue that such a finding was unnecessary, that does not change the fact that appellants failed to show that the court's plan violated the law; therefore, the court's judgment should be summarily affirmed.

The other issues which appellants raise are easily disposed of. Appellants contend that the court below failed to make sufficient findings of fact for purposes of a Voting Rights Act case. (Senate's Jur. State., pp. 24-25; Hispanic Chamber's Jur. State., p. 12). However, this was *not* an action alleging a violation of the Voting Rights Act; it was an action to adopt new districts in the face of a legislative deadlock. There can be no obligation to make findings as to every element of a Voting Rights Act violation where a court need only choose the redistricting plan that best complies with the law. Indeed, appellants acknowledge this elsewhere in their Jurisdictional Statements by contending that a violation of the Act need not be shown for purposes of adopting a redistricting plan. (Sen. Jur. State., p. 14; Hispanic Chamber's Jur. State., p. 9).

The other issues presented by the appellants are based on mischaracterizations of the district court's decision, and are therefore not properly raised before this Court. Those issues are: (1) whether the district court purportedly elevated neutral redistricting criteria over the Voting Rights Act (Senate's and Hispanic Chamber's Jur. State., p. i), (2) whether the district court erred in purportedly using incorrect causation standards to determine racially polarized voting (Hispanic Chamber's Jur. State., p. i), and (3) whether the district court erred by ordering

into effect — without preclearance — its redistricting plan "without exigent circumstances." (Hispanic Chamber's Jur. State., p. i). Each of these issues is based on an erroneous reading of the court's opinion.

I. THE DISTRICT COURT'S REDISTRICTING PLAN DOES NOT CONSTITUTE UNLAWFUL RETROGRESSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The first issue raised by the appellant Senate is "[w]hether, by adopting a redistricting plan that provides proportionately fewer districts in which minority voters have a reasonable opportunity to elect candidates of their choice than existed prior to redistricting, the district court violated the retrogression standard of Section 5 of the Voting Rights Act." (Senate's Jur. State., p. i).

The Senate actually argues two propositions: (1) that a plan that does not reflect the minority voter strength of Arizona's population constitutes retrogression, and (2) that a plan that reduces the *percentage* of minority-controlled districts from one out of five to one out of six constitutes retrogression. (*See id.* at 10).

Neither argument is supported by the law, *see Beer v. United States*, 425 U.S. 130, 141 (1976); *City of Richmond v. United States*, 422 U.S. 358, 370-371 (1975), and indeed, appellants failed to make the requisite showing to enable them to raise the issue: Appellants never showed that a second minority district could be formed. Even with "an unreasonable gerrymander," appellants could only form, at best, a district with an *aggregate* minority voting age population of 43.6%, and failed to show that the various minority groups were politically cohesive such that they could be aggregated. Indeed, the evidence was to the contrary. (TT 4/13/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-84).

Nonetheless, based on an aggregated minority population, appellants argue that the "court's plan does not fairly reflect the voting strength of Arizona's minority population," and that this constitutes "illegal retrogression under Section 5 of the Voting

Rights Act as this Court has repeatedly held." (Senate's Jur. State., p. 10; Hispanic Chamber's Jur. State., pp. 9-10).

However, first, Hispanics do have proportionate representation under the court's plan: They comprise 15.7% of Arizona's voting age population, and since one of Arizona's six districts, or 16.67% of the districts, already gives Hispanics the opportunity to elect the candidate of their choice, the plan gives them proportionate representation.

Second, this Court has not held that the failure of a redistricting plan to reflect a minority group's voting strength constitutes illegal retrogression. *See Beer v. United States*, *supra*, 425 U.S. 130, 141.

Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c, requires that redistricting by a state or political subdivision "not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race, color, or membership in a language minority group. Retrogression occurs only when the ability of minority groups to participate in the political process is made worse off by the voting practice change. *See* 28 C.F.R. § 51 54(a). The failure of a redistricting plan to reflect the minority's proportion of the jurisdiction's population will not constitute retrogression where the absolute number of districts in which minorities have the opportunity to elect the representative of their choice remains the same. *Beer v. United States*, *supra*, 425 U.S. 130, 141; *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) ("Although there may have been no improvement in [minority] . . . voting strength, there has been no retrogression either"); *see Ketchum v. Byrne*, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984); *Good v. Austin*, ___ F. Supp. ___, 1992 W.L. 173862 at 4 (E.D. Mich. 1992).

In *Beer v. United States*, *supra*, 425 U.S. 130, this Court held that it was error for the district court to conclude that a redistricting plan containing only a single district with a black *voter* majority had the effect of denying the right to vote within the meaning of Section 5 of the Voting Rights Act because on a proportional basis, black voters should be able to choose 2.42 representatives. There, before redistricting, African Americans

constituted half of the registered voters (and a majority of the population) in one councilmanic district. A redistricting plan established an African-American voter majority in one district and a population majority in another district. Nonetheless, the district court ruled that the plan had the effect of abridging the right to vote on account of race under Section 5 because, based on their share of the city's registered voters, African Americans should be able to choose 2.42 of the city's seven councilman. This Court held that it was error for the district court to conclude that the plan violated the retrogression standard of Section 5 because "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Id.* at 141.

In this case, too, the court enhanced the position of minorities by retaining the Hispanic district (district 2), increasing the percentage of Hispanics in that district to the level advocated by appellants,[10] and increasing the percentage of Native Americans in another district from a maximum of 14.2% before the court's plan (Sen. exh. 109) to 21.7% under the court's plan. (*See* Hispanic Chamber's Jur. State., Appendix, p. 25A).

Likewise, in *Ketchum v. Byrne*, *supra*, 740 F.2d at 1402 n.2, the Seventh Circuit, in approving the district court's finding of a Section 2 violation based on retrogression in the number of wards with a black majority population, defined "retrogression" as a *decrease* in the *absolute* number of representatives which a minority group has a fair chance to elect:

> "Retrogression" may be defined as a decrease in the new districting plan or other voting scheme from the previous plan or scheme in the absolute number of representatives which a minority group has a fair chance to elect. [citations omitted] Here, the term

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[10] Indeed, the court increased the Hispanic percentage of the voting age population in district 2 from 39.3% to 44.77%, and appellants took the position that any greater Hispanic percentage in district 2 would constitute prohibited "packing." (*See* Senate's Jur. State., p. 5).

> refers to a reduction in the number of wards with an effective majority of the relevant minority group from the number of such wards which existed immediately before the redistricting plan was instituted. . . . To correct retrogression does not necessarily (or usually) imply the achievement of proportional representation.

Ketchum v. Byrne, *id.*, 740 F.2d at 1402 n.2.

The Senate's argument that the court's plan constitutes unlawful retrogression because it does not "fairly reflect the voting strength of Arizona's minority population" (Senate's Jur. State., p. 10) is therefore not only contrary to the case law — which looks at whether the absolute number of minority districts has been decreased — but conflicts with the express disavowal against proportional representation in Section 2 of the Voting Rights Act. Section 2 provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Indeed, if the retrogression standard prohibited redistricting that does not "fairly reflect the voting strength" of a state's minority population, as argued by the Senate, anything *less* than proportional representation would constitute retrogression, making Section 2's proviso a dead letter. Courts have consistently declined to make proportional representation a requirement under the Voting Rights Act. *See, e.g., Beer v. United States, supra*; *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991); *Burton v. Sheheen*, 793 F. Supp. 1329, 1992 WL 106354 at 10 (D.S.C. 1992). Nor, of course, would it be practical to require proportional representation: The number of minority-controlled districts that can be created depends on the concentrations and locations of the minority populations in the jurisdiction in issue.

The Senate contends that *City of Port Arthur v. United States*, 459 U.S. 159 (1982), "requires the district court to assure that a proposed redistricting plan . . . fairly reflects the minority's voting strength" (Senate's Jur. State., p. 11), but *Port Arthur* holds nothing of the kind. In *Port Arthur*, the percentage of the black population had been diluted from 45.2% to 40.56% through the *city's* consolidations with neighboring cities and an annexation.

Since the city expansions had the effect of diluting the "relative political strength of the black community," this Court affirmed a judgment of the district court which sought to dispel the adverse impact of the expansion through a plan providing for a black majority in three of six single-member council districts and requiring a plurality vote, rather than a majority, for two of the city's three at-large districts. The Court concluded that without the elimination of the majority vote requirement for the at-large districts, "[i]t does not necessarily follow that the mixed single-member and at-large system at issue . . . sufficiently dispelled the impact of Port Arthur's expansions on the relative political strength of the black community." *Id.* at 167.

Port Arthur has no application here because in that case, the minority population was made worse off by the city's change — the city's expansion — and Section 5 approval, therefore, required that it be neutralized to the extent possible. *Port Arthur* does not, and in light of the proviso in Section 2 of the Act could not, stand for the proposition that all redistricting plans must reflect each minority's percentage of the population.

In contrast, in this case, the minority population has not been made worse off by the court's redistricting plan. Instead, they have retained their minority districts and increased their percentage of the voting age population in several districts.

The Senate and Hispanic Chamber argue that retrogression also exists because minority districts have been reduced from one of five (20%) to one of six (16.67%), thereby reducing the *percentage* of districts from which minorities can elect the candidate of their choice. (Senate's Jur. State., pp. 10, 12; Hispanic Chamber's Jur. State., pp. 9-10).

However, since it is mathematically impossible for Hispanics, or other minorities, to retain 20% of Arizona's six congressional seats, appellants are arguing that Hispanics, or other minorities, are entitled to 33% (2 seats), or double the Hispanics' proportion of Arizona's voting age population.

In *City of Richmond v. United States*, 422 U.S. 358, 371 (1975), this Court rejected appellants' argument that a redistricting plan violates Section 5 where it decreases the *percentage* of minority districts. There, the City of Richmond annexed additional land reducing the percentage of black citizens in the city from 52% to 42%. In a section 5 proceeding, the city put forward a nine-ward proposal in which four wards would have substantial black majorities, four would have substantial white majorities, and the ninth would have a racial division of 59% white and 41% black. This Court reversed the district court's holding that the plan had the effect of abridging the right to vote within the meaning of Section 5, because blacks would constitute a lesser proportion of the population after the annexation and have the opportunity to elect fewer representatives to the city council:

> To hold otherwise would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area. We are unwilling to hold that Congress intended either consequence in enacting § 5.

City of Richmond v. United States, supra, 422 U.S. at 371.

Appellant's argument that the reduced *percentage* of minority-controlled districts constitutes retrogression is also flawed because the reduced percentage is the direct result of the *federal* reapportionment wherein Arizona was awarded an additional district. 2 U.S.C. § 2a. The Voting Rights Act only covers voting practice changes by a *State*, and Section 5 was intended to prohibit only *states* from making discriminatory voting changes. Unlike *Port Arthur*, where *state* action led to the dilution of black voting strength, the *percentage* reduction in minority seats from

one of five to one of six is the result of *federal* action, does not dilute voting strength, and cannot be considered retrogression.[11]

Accordingly, appellants' position that the court's congressional redistricting plan constitutes retrogression has no basis. The Voting Rights Act disavows any obligation to provide proportional representation, the Hispanic community nonetheless has proportional representation, the court's plan enhances minority voting strength, and the reduction in the *percentage* of minority districts is due to the federal apportionment of an additional district to Arizona, not any action the state controls.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE LAWFULNESS OF THE COURT-ADOPTED PLAN

The next issue presented by the Senate and Hispanic Chamber is whether "the district court misapplied this Court's decision in *Thornburg v. Gingles* by requiring the parties to prove a violation of Section 2 of the Voting Rights Act as a prerequisite to the creation of additional districts in which minorities have an equal opportunity to elect candidates of their choice." (Senate's Jur. State., p. 13; *see also* Hispanic Chamber's Jur. State., pp. 6-9).

There are two answers to this: First, the district court never stated that a Voting Rights Act violation was a prerequisite to the creation of minority districts, only that the parties had failed to demonstrate a violation under the Voting Rights Act because there was no proof that "a white majority voted sufficiently as a

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[11] *McMillan v. Escambia County, Florida*, 559 F. Supp. 720 (N.D. Fla. 1983), *cert. denied*, 464 U.S. 830 (1983), also cited by the Senate, is distinguishable on the same grounds as *Port Arthur*. The district court was again considering the lawfulness of a *state* action to expand the seats on a county commission from five to seven, which would dilute the right of African Americans to elect commissioners from 20% to 14% of the commissioners, where blacks constituted approximately 20% of the county's population. Again, the *state* plan to expand the seats had the effect of reducing minority voting strength, whereas here, it is the *federal* apportionment of an additional seat that is responsible for any reduction in the minority population's percentage share of the congressional districts.

bloc to usually defeat a minority's preferred candidate" — the third prong of the *Gingles* test. (Opinion at 8A). Second, appellants nowhere contend that the court-adopted plan violates Section 2 of the Voting Rights Act if *Thornburg* is properly applied. Therefore, the court's plan is lawful, and in light of the court's discretion to select a redistricting plan in the face of a legislative impasse, its judgment must be affirmed.

A. The District Court Did Not Misapply The Voting Rights Act.

Appellants argue that the district court held "that the parties must demonstrate a threshold violation of Section 2 of the Voting Rights Act in order for a three-judge district court to consider the effects of redistricting on minority voting strength," and that this "entirely misconstrues the Act's proper role in the redistricting process." (Senate's Jur. State., pp. 9, 13-15; *see also* Hispanic Chamber's Jur. State., pp. 6-9).

The appellants' argument is based on a single sentence in the district court's opinion, which states: "Accordingly, the court also finds that the parties, and particularly the Senate, failed to demonstrate that there has been a denial or an abridgement of the right to vote on account of race or color, requiring remedial action under the Voting Rights Act." (Appendix, pp. 8A-9A).

Read in context, the only point of the sentence is that no showing had been made that required a plan that affirmatively created a minority district that would otherwise not be required but for the need to remedy a prior violation. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991) (To require that the minority constitute a majority in a district before creating it "would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives. . . .") The sentence in no way states that a violation of the Act is a prerequisite to consider the effects of redistricting on minority voting strength.

Indeed, contrary to appellants' contention, the court expressly considered the effects of redistricting on minority voting strength in its selection of a redistricting plan. First, the

district court determined that its plan "comports with the requirements of the Voting Rights Act by giving Arizona's Hispanic population an opportunity to elect a candidate of their choice in District 2" and concluded that the percentage level of Hispanics advocated by appellants was sufficient for District 2. (Opinion at 9A).

Second, it determined that the failure to make an additional majority-minority district did not constitute a violation of the Voting Rights Act and that such a district (which would not have been a majority-minority district in any event) would have fragmented and splintered communities of interest:

> The Senate also argues that the failure to make the new district six a second majority-minority district would constitute a violation of the Voting Rights Act. The Senate's argument is founded on the principle that there is a right to proportional representation. No such right exists. [citations omitted] Under any of the proposed plans, district six encompasses hundreds of square miles of sparsely populated areas in the eastern and northern parts of the state. Applying the totality of the circumstances test under the Voting Rights Act, the court finds that adopting the Senate's reasoning would result in block-by-block redistricting over a large geographical portion of Maricopa County. The effect would be the fragmentation and splintering of communities of interest, resulting in an unreasonable gerrymander. *See Gingles*, 478 U.S. at 49.

Opinion at 10A-11A.

Thus, the court properly applied the Voting Rights Act, considered the effect of redistricting on minority voting rights, and concluded that the appellants had not shown that their gerrymandered, block-redistricted sixth congressional district was necessary in order to satisfy the Voting Rights Act.

B. Even Assuming, Arguendo, That The District Court Erroneously Required Proof of A Violation Of The Voting Rights Act, It Was Harmless Error Because Appellants Fail To Show That The Court-Adopted Plan Violates The Law.

Even assuming, *arguendo*, that the district court misapplied the Voting Rights Act by purportedly requiring the parties to prove a violation of Section 2 of the Act, the finding was harmless. None of the appellants contends — or makes any showing — that the court-adopted plan (or the Indian Compromise Plan on which it was based) violates Section 2 of the Act; therefore, the court's redistricting plan must be upheld.

In the case of a legislative impasse, the district court has discretion in the adoption of a redistricting plan as long as it complies with federal and state law. *See, e.g., O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202-03 (D. Kan. 1982).

Appellants make no contention in their Jurisdictional Statements (and made no showing in the court below) that the court-adopted plan, or the Indian Compromise Plan on which it was based, violated any constitutional, statutory, or neutral redistricting criteria (save for their argument that it does not provide for proportional representation).

Accordingly, regardless of whether the district court misapplied the Voting Rights Act (and it did not), the judgment can be affirmed since the redistricting plan was lawful. This Court "may permit the appellee to defend a judgment on any ground that the law and record permit and that would not expand the relief granted." Rule 18.6, Rules of the Supreme Court of the United States; *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) ("When we summarily affirm, without opinion, the judgment of a three-judge district court, we affirm the judgment but not necessarily the reasoning by which it was reached"); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (The judgment of a district court may be sustained "on any ground that finds support in the record.")

C. Voinovich v. Quilter Is Irrelevant To The Instant Case.

The appellant Senate observes that this Court recently noted probable jurisdiction in *Voinovich v. Quilter*, 794 F. Supp. 695 (N.D. Ohio), *vacated in part on other grounds*, 794 F. Supp. 760 (N.D. Ohio), *prob. jur. noted*, 112 S. Ct 2299 (1992). Appellant argues that this Court may wish to consider this case in conjunction with *Quilter* because *Quilter* presents "a similar question" in that "a divided three-judge district court held that a state legislature could not create minority legislative districts absent proof of a violation of the Voting Rights Act." (Senate's Jur. State., p. 14).

However, as noted earlier, the court below did not hold that minority districts need not be created absent proof of a Voting Rights Act violation; indeed, it enhanced Hispanic voting strength in district 2.

In any event, *Quilter* is a very different case from this one. In *Quilter*, the district court enjoined a 1991 redistricting plan *prepared by an Apportionment Board* because the board had failed to justify the creation of minority-controlled districts in the plan. Whereas the issue in *Quilter* is whether the federal court may substitute its judgment for the redistricting body's judgment, in this case the federal court *is* the body responsible for adopting a redistricting plan owing to the legislative deadlock. Whereas the issue in *Quilter* is whether a state redistricting body is *permitted* to create minority districts where it has not established that a violation of Section 2 of the Voting Rights Act purportedly requires their creation, *see Voinovich v. Quilter*, no. 91-1618, Jur. State., p.i, 10, the issue here is whether a federal court's redistricting plan is *required* to create an aggregate minority district.

Since appellants do not claim that the court's plan fails to comply with the Voting Rights Act, save for their argument that proportionality is required, the judgment here should be summarily affirmed.

III. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE ADEQUACY OF THE DISTRICT COURT'S FINDINGS

The appellant Senate argues that the district court's opinion does not comply with the requirements of Rule 52(a), Federal Rules of Civil Procedure, because it fails to discuss "significant evidence contrary to its opinion or to explain the factual bases of its decision." (Senate's Jur. State., p. 24) The Senate bases this argument on the grounds that the requirements of Rule 52(a) must be "strictly enforced in Voting Rights Act cases." *Id.*

However, this is not a Voting Rights Act case wherein a plaintiff alleges that an enacted redistricting plan violates the Act. Instead, in this case, the district court was required to adopt a redistricting plan following the 1990 reapportionment because of a legislative stalemate. (Complaint, ¶¶ 23, 24). In such an instance, the district court need only choose a plan that appears to best comply with the constitutional and statutory redistricting criteria. *See, e.g., Good v. Austin*, ___ F. Supp. ___, 1992 WL 173862 at 2 (E.D. Mich. 1992); *Hastert v. State Board of Elections*, 777 F. Supp. 634, 640 (N.D. Ill. 1991); *Wilson v. Eu*, 1 Cal. Rptr. 4th 707, 743 (1992).

Accordingly, the court here made sufficient findings when it analyzed each proposed plan, explained each plan's shortcomings, and described why its plan was the best. The cases cited by the Senate for the contention that further findings are necessary are inapposite. Those cases involved alleged violations of the Voting Rights Act, *e.g., Velasquez v. City of Abilene, Texas*, 725 F.2d 1017 (5th Cir. 1984), and therefore necessarily involved findings as to each element of a Voting Rights Act violation.

Indeed, appellants defeat their argument by acknowledging that a court need not find a violation of the Voting Rights Act in order to adopt a redistricting plan in the face of a legislative stalemate. (*See* Senate's Jur. State., pp. 13-15; Hispanic Chamber's Jur. State., p. 9).

In any event, since a redistricting plan need only comply with the Voting Rights Act, and that merely requires that the plan *avoid* satisfying just one of the elements of a Voting Rights Act violation, *see Wilson v. Eu*, 1 Cal. Rptr. 4th 707, 745 (1992), detailed findings as to each element under the Voting Rights Act

are not required. *See Burton v. Sheheen*, 793 F. Supp. 1329, 1992 WL 106354 at 13 (D.S.C. 1992) (in adopting a redistricting plan in a non-section 2 challenge, the court should consider the standards of Section 2 but it is not obligated "to completely graft the tests and requirements of Section 2, including its searching evidentiary requirements" in the proceeding).[12]

IV. THE OTHER ISSUES PRESENTED BY APPELLANTS ARE NOT PROPERLY BEFORE THIS COURT

A. There Is No Issue Whether Neutral Redistricting Criteria Were Elevated Over Consideration Of Minority Voting Rights

The appellant Senate presents as an issue whether "the district court improperly elevate[d] the so-called 'neutral criteria' of protecting incumbents, maximizing compactness of districts, and preserving communities of interest above the adoption of a plan that fairly reflects . . . minority voting strength . . . where the State's public policy is to protect voting strength . . . ." (Senate's Jur. State., p. i).

The Hispanic Chamber likewise asks whether the court below erred "in elevating nonconstitutional good government factors to primary considerations over minority voting rights . . . ." (Hispanic Chamber's Jur. State., p. i).

To the contrary, the district court did not elevate neutral redistricting criteria over minority voting rights. It expressly recognized that the requirements of the Constitution and the Voting Rights Act had to be met before the court could look at neutral redistricting criteria:

> *Once the constitutional and Voting Rights Act standards are met*, a court may look to several neutral criteria. These criteria are (1) preserving communities of

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[12] Appellants argue that, assuming more detailed findings are required, the district court inadequately explained how such factors as finances, the quality of the candidate, and campaign strategy "rendered the parties' proof of racial bloc voting unpersuasive." (Senate's Jur. State., p. 25). As shown in section IV(B), the court's opinion does not say that.

> interest, (2) providing geographically compact and contiguous districts; and (3) avoiding unnecessary or invidious outdistricting of incumbents.

(Opinion at 6A). [Emphasis added].

Further, only after the court determined that its plan "comports with the requirements of the Voting Rights Act by giving Arizona's Hispanic population an opportunity to elect a candidate of their choice in district two" (Opinion at 9A) and only after it rejected the appellants' efforts to create a gerrymandered 43.6% minority voting age district in district 6 (Opinion at 10A-11A) did the court turn its attention to the neutral redistricting criteria for drawing congressional districts and determined that its plan best complied with those criteria as well: "The court next turns its attention to the neutral criteria for drawing congressional districts." (Opinion at 11A).

The appellant Senate argues that "[t]he district court plainly erred in substituting its priorities for the clear public policy of Arizona" which it claims is "to enhance minority voting strength. . . ." It claims that "[a] clear expression of this State policy can be seen in the legislative parties' plans presented to the court below." (Senate's Jur. State., p. 19).

Appellant is incorrect to contend that the district court erred in substituting its priorities for the public policy as expressed in the legislative parties' plans. Where there is a legislative impasse, courts are not obligated to accord special deference to a legislative proposal that has not been enacted. *See, e.g., Major v. Treen*, 574 F. Supp. 325, 335-336, n.15 (E.D. La. 1983), *aff'd sub nom., Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) ("Both the Governor and the legislature are integral components of the legislative process; thus any plan that does not survive this process to become law . . . cannot be deemed a clear articulation of established state goals"); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 932 (W.D. Mo. 1982); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

In contrast, *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982), cited by the Senate, involved a *duly enacted* plan. In contrast with

proposed plans, courts are to treat with deference those portions of *duly enacted* redistricting legislation to which no legal challenge is made. *See, e.g., White v. Weiser*, 412 U.S. 783, 796 (1973) (with respect to a duly enacted Texas redistricting plan that had been found to contain impermissible population variances, the district court erred by failing to choose the plan that both cured the constitutional defects and "most clearly approximated the reapportionment plan of the State Legislature"); *Upham v. Seamon*, *supra*, 456 U.S. 37, 40-41 (1982) (this Court held that the district court exceeded its discretion when, in ordering relief, it revised duly enacted districts to which no Voting Rights Act objection had been made). In this case, given the legislative deadlock, the district court was not obligated to adopt the Senate's plan as the purported expression of State public policy, and in any event, the Senate's block-by-block redistricting, resulting in "an unreasonable gerrymander," has never been Arizona State policy.

Appellant Senate contends that the district court elevated neutral criteria at the expense of minority voting concerns in allegedly fragmenting "three 72-83% Hispanic precincts . . . away from Hispanic majority District 2 and into District 3 . . . to avoid outdistricting an incumbent . . ." (Senate's Jur. State., p. 20 n.17). This apparently refers to the court's decision to include El Mirage and Surprise in district 3 rather than district 2. However, the evidence showed that these precincts were geographically separate and distant from the remainder of the Hispanic population in district 2 (TT 4/13/92 at 123, 127), and linking them to district 2 would add only approximately 1% to the Hispanic population in district 2 (Opinion, p. 14A), an additional amount that appellants argued was unnecessary to allow the Hispanic population in district 2 to elect the candidate of their choice.[13]

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[13] The Senate also argues that the protection of incumbents "should never be used at the expense of minority voting strength," implying that somehow the court was guilty of doing so. (Senate's Jur. State., p. 21). However, the court did not seek to protect incumbents but simply sought to avoid "unnecessary or invidious outdistricting of incumbents." (Opinion at 7A)

B. There is No Issue As To Whether The Court Erred In Its Findings Concerning Racial Bloc Voting.

Both appellants argue that the district court "adopted the erroneous position that racially polarized voting can be explained away by factors such as party affiliation — a question on which this Court was divided in *Gingles*" and that "it is important that this Court resolve this issue in order to give adequate guidance to the district court." (Senate's Jur. State., p. 22; *see also* Hispanic Chamber's Jur. State., pp. i, 10-13).

However, the court did not do this, and no such issue is properly raised on appeal. First, the court below did not rule that "racially polarized voting" can be explained away by party affiliation. Rather, the court correctly ruled that none of the parties had proven "that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate" and that *instead* voting behavior was closely associated with party affiliation:

> It was clear from all the evidence that there are some differences between the voting patterns of Hispanics and non-Hispanics. However, none of the parties proved that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate. *See Gingles*, 478 U.S. at 48-49 (holding bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group). Instead, the evidence showed that Arizonans' voting behavior is also closely associated with party affiliation. Accordingly, the court finds that the parties have not satisfied the third prong of the *Gingles* test.

(Opinion at 8A).

Accordingly, the court never stated that party affiliation explains away racial bloc voting, only that there was no evidence that the white majority votes as a bloc to defeat a minority's preferred candidate. Indeed, racial bloc voting was not the issue, but instead whether it rose to the point where the white majority

votes as a bloc to defeat the minority's preferred candidate. *See Thornburg v Gingles*, 478 U.S. 30, 52-56 (1986).

Second, even if the district court had determined that racial bloc voting was explained away by party affiliation, it would be irrelevant because appellants made no showing that they satisfied the other elements of a Voting Rights Act violation under *Gingles* such that the failure to create their aggregate minority district would violate the Voting Rights Act. For instance, they failed to show the existence of a geographically compact minority group sufficiently large to elect the representative of its choice in district 6, or political cohesiveness among the minority groups.

Third, the issue is not properly raised here because appellants do not point to any portion of the record that shows that they proved that the white majority voted so much as a bloc *that it usually defeated* a minority's preferred candidate, particularly in connection with district 6. To the contrary, the evidence presented by the appellant Senate showed that Hispanic legislators were winning in districts with substantially less than a 30% Hispanic population.[14]

C. There Is No Issue As To Whether The District Court Ordered Its Plan Into Effect Without A Finding Of Exigent Circumstances

The Hispanic Chamber argues that the "district court erred by ordering into effect its own permanent plan for elections without exigent circumstances and thereby completely circumventing Section 5 preclearance requirements for an entire decade." (Hispanic Chamber's Jur. State., p. 14; *see also* Hispanic Chamber's questions presented).

The appellants misunderstand the basis on which preclearance was excused; therefore, the issue is not properly raised. Preclearance was not excused on the basis of exigent circumstances (although they could have — the court's decision

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[14] The President of the Arizona State Senate, Peter Rios, a Hispanic, testified that he won in a district that was less than 30% Hispanic in population. (TT 4/15/92, evening session at 12). *See also* note 7, *infra*.

came only 21 days before the date for filing candidate nominating petitions),[15] but instead on the basis that the court-adopted plan did not need to be precleared under *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981), because it does not "reflect[] the policy choices of the elected representatives of the people." (Opinion at 18A). In *McDaniel v. Sanchez*, *id.*, this Court ruled that although the Voting Rights Act preclearance requirement under Section 5 does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation, *id.* at 138, it does apply when the court adopts a proposal "reflecting the policy choices of the elected representatives of the people." *Id.* at 153.

In this case, the district court expressly found that its plan, which was based on the Indian Compromise Plan and then further modified by the court, did not reflect the policy choices of the elected representatives of the people but "solely reflects the decision of the court." (Opinion at 18A). The district court accordingly concluded that the plan was not subject to preclearance and ordered the plan into effect unless the Arizona Legislature enacts its own plan which meets the requirements of federal law. (Opinion at 18A, 20A).

Significantly, the Hispanic Chamber's jurisdictional statement does not contest this finding. Appellants instead argue that exigent circumstances did not exist to excuse preclearance. (Hispanic Chamber's Jur. State., p. 14-15). Since exigent circumstances were not the basis for excusing preclearance, appellants' issue is not appropriate for review.[16]

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[15] *See* A.R.S. §§ 16-311, 16-314; Opinion at 20A.

[16] Moreover, the Hispanic Chamber waived its right to claim error by not responding to the court when it raised the issue of preclearance as to the Indian Compromise Plan. (TT 4/17/92 at 56).

V. CONCLUSION

For all these reasons, appellees submit that none of the issues raised by appellants merit plenary review by this Court. Appellants fail to show that the district court had an affirmative obligation to gerrymander Arizona's new district in an attempt to create a 43.5% combined minority voting-age-population district through block-by-block redistricting (where the right to aggregate minority groups was not shown), or that the district court's plan violated the law. The judgment below should be summarily affirmed.

DATED: September 30, 1992

Respectfully submitted,

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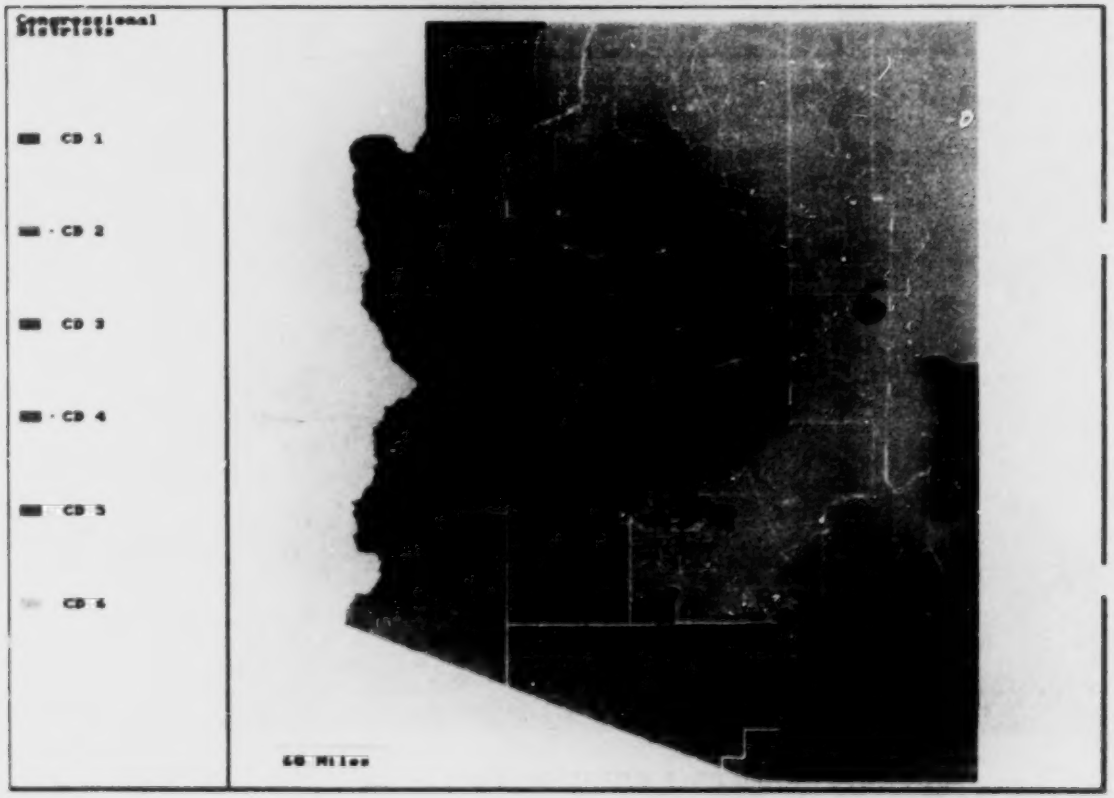
APPENDIX A

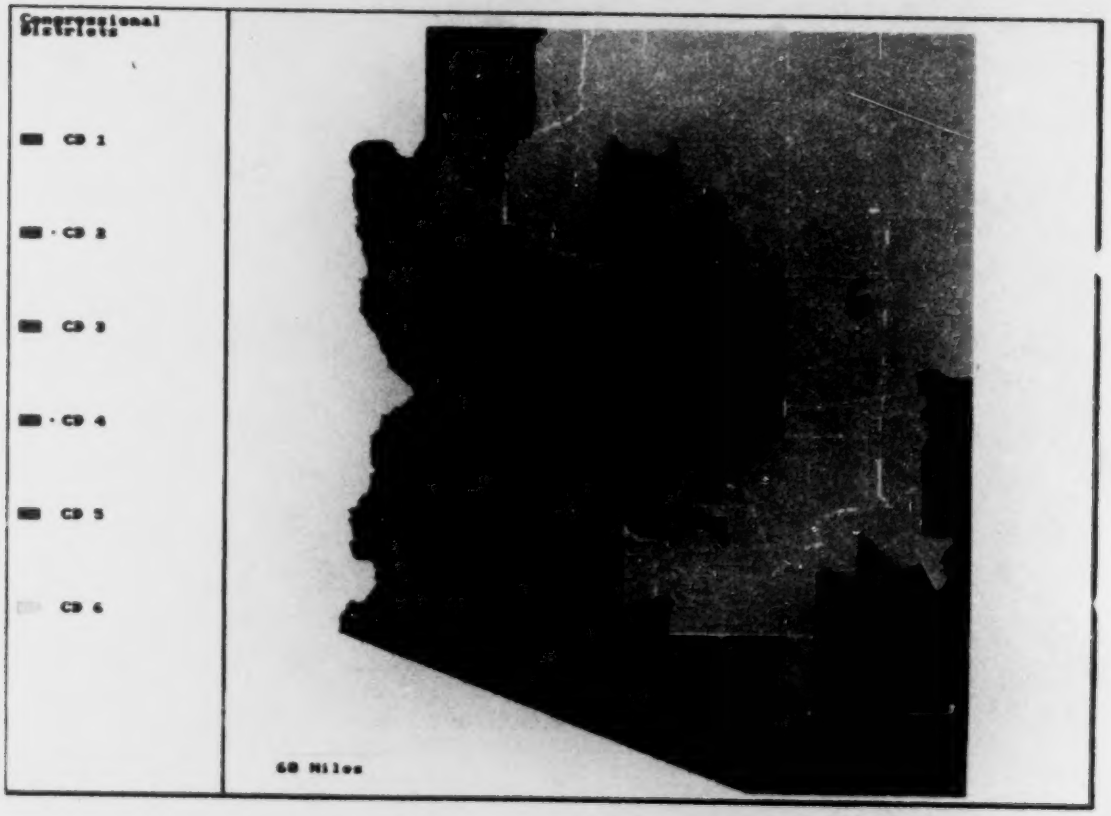
Senate's Proposed Congressional Districts - Arizona



Senate's Proposed Congressional Districts - Phoenix

APPENDIX B

Hispanic Chamber/Hispanic Forum



Hispanic Chamber/Hispanic Forum

Maricopa County portion of Hispanic Chamber's District 6